

19
No. 84-1360

Supreme Court, U.S.
FILED

JUN 28 1985

ALEXANDER E. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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APPEAL DOCKETED FEBRUARY 26, 1985
PROBABLE JURISDICTION NOTED APRIL 15, 1985

BEST AVAILABLE COPY 116 120

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JOINT APPENDIX *

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. 82-0059M

THE CITY OF RENTON, *et al.*,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
Jan 20	1	COMPLAINT—for declaratory judgment and preliminary injunction s/c issued.
Jan 20	2	MOTION—for preliminary injunction with oral argument requested.
Jan 20	3	MOTION—for leave to file a brief of twenty pages. Brief is memorandum in support of motion for preliminary injunction.
Jan 20	—	RECEIVED and LODGED—Pltf's Memorandum in Support of Motion for preliminary injunction. Lodged pending outcome on motion for leave to file.
Jan 20	—	RECEIVED and LODGED—Order to Show Cause why preliminary injunction should not issue.
Jan 22	4	ORDER OF REFERENCE—to Magistrate Sweigert for handling of dispositive motions. cc: Counsel and Magistrate.

DATE	NR.	PROCEEDINGS
1982		
Jan 22	—	LODGED and RECEIVED—Order (for leave to file excess brief).
Jan 22	5	MOTION—for temporary restraining order. (To Mag. Sweigert).
Jan 22	6	ORDER—Pltfs request to file brief of twenty pages is GRANTED. cc: Counsel.
Jan 25	7	PLTF'S MEMORANDUM—in support of Motion for Preliminary Injunction. (Over-sized filed by leave of Court on 1/22/82.)
Jan 25	8	ORDER—to show cause why temporary restraining order should not issue (set for 1:30 pm Friday 1/29/82 before Sweigert). cc: Counsel.
Jan 25	9	APPLICATION—for permission to participate by Robert Eugene Smith on behalf of Pltf. as co-counsel to Jack Burns.
Jan 25	10	ORDER—GRANTING R.E. Smith permission to participate for PLTF. cc: Counsel.
Jan 25	11	AFFIDAVIT OF SERVICE—of (1) summons and complaint; (2) Pltf's memo in support of motion for Prelim. Injunct.; (3) motion for prelim. injunct.; (4) motion for leave to file 20 page brief; (5) motion for prelim. injunct. (oral requested); proposed order to show cause all served on City of Renton (Delores H. Mead, City Clerk) and Jim Bourasa, Acting Chief of Police. Service on 1/21/82.
Jan 27	12	AFFIDAVIT OF SERVICE—of (1) summons and complaint; (2) PLTF's memo in support of motion of Preliminary injunction; (3) Motion for leave to file brief of 20 pages; (4) Motion for preliminary in-

DATE	NR.	PROCEEDINGS
1982		
		junction (oral argument requested); (5) order to show cause served on Mayor Barbara Y. Shinpoch on 1/22/82.
Jan 27	13	NOTICE OF APPEARANCE—by Lawrence J. Warren and Daniel Kellogg for all defts.
Jan 27	14	DEFTS MEMORANDUM—in opposition to Motion for Temporary Restraining Order and Preliminary Injunction.
Jan 27	15	AFFIDAVIT—of Gary F. Kohlwes, Superintendent of Renton School District and Secretary of Renton School Board support of Deft's opposition to Motions.
Jan 27	16	AFFIDAVIT—of David R. Clemens, Policy Development Director of City of Renton in support of Deft's opposition to Motions.
Jan 28	17	AFFIDAVIT—in support of Pltf's motions for TRO and Preliminary injunction (affidavit by Jack R. Burns).
Jan 28	18	PLTF'S REPLY—to Deft's memorandum in opposition to motion for TRO and Preliminary Injunction.
Jan 29	19	PRAECIPE—issue one civil subpoena for hearing on 1/29/82 at 1:30pm. Issued db.
Jan 29	20	OBJECTION—to and motion to strike portions of Affidavits of Jack R. Burns dated January 21, and January —, 1982 submitted by Defts.
Jan 29	—	RECEIVED and LODGED—Order denying motion for TRO submitted by Defts.
Jan 29	21	RETURN ON SERVICE—for service of subpoena on David R. Clemens served 1/29/82 at 10:45 am for hearing on 1/29/82 at 1:30 pm.

DATE	NR.	PROCEEDINGS
1982		
Jan 29	—	Hearing on Motion for TRO, reporter Susan Palmerton—Magistrate advised counsel that he will recommend to Judge McGovern that no TRO be entered. Mag's R&R will be filed 2/1/82. Counsel will have 10 days to file objections. Hearing on preliminary injunction issues to be set later. Exhibits 1-5 admitted.
Feb 3	22	REPORT AND RECOMMENDATION—of Sweigert.
Feb 3	—	RECEIVED and LODGED—Order to be presented to Judge McGovern for signature NLT 2/16/82 if no objections are filed by 2/15/82. Order contains (1) R&R approval; (2) Pltf's motion for TRO denied; and distribution instructions.
Feb 9	23	AMENDED AND SUPPLEMENTAL COMPLAINT—for declaratory judgment and preliminary and permanent injunction.
Feb 10	24	TESTIMONY—of David R. Clemens on 1/29/82 before the Magistrate at hearing on Pltf's motion for TRO. (Original to Magistrate, copy in court file.)
Feb 12	25	OBJECTIONS—to Magistrate's report and recommendation filed by Pltf.
Feb 18	—	LETTER—from Pltf's counsel to Deft. Counsel confirming hearing on Pltf's motion for a preliminary injunction set for 3/19/82 before Magistrate Sweigert.
Feb 18	26	NOTICE OF MOTION—Pltf's Objections to the Report and Recommendation of Magistrate will be set for 3/5/82.

DATE	NR.	PROCEEDINGS
1982		
Feb 18	27	CERTIFICATE OF SERVICE—of Notice of Motion mailed to Deft. counsel on 2/17/82.
Feb 19	28	NOTICE OF DEPOSITION—of David Clemens on 3/3/82 and City of Renton on 3/3-4/82 at the request of Pltf.
Feb 22	29	MOTION—(by Deft) to dismiss complaint pursuant to FRCP § 12(b)(1) and § 12(b)(6)—court lacks jurisdiction and Pltfs have failed to state a claim upon which relief can be based.
Feb 22	30	MEMORANDUM—of points and authorities in support of Deft's Motion to dismiss.
Feb 22	31	NOTICE—of Motion to dismiss. (Requested by separate motion that motion to dismiss be before Judge McGovern) set for 3/12/82.
Feb 22	32	DEFTs' MOTION—for hearing of Motion to Dismiss complaint before District Court Judge.
Feb 22	33	NOTICE OF MOTION—for hearing motion to dismiss before District Court Judge set for 3/12/82.
Feb 22	—	LODGED—Order to Hearin Motion to Dismiss Complaint Before District Court Judge.
Feb 22	34	APPLICATION—for permission to participate by James J. Clancy in association with Warren & Kellogg, P.S. as attorney of record for Defts.
Feb 22	35	NOTICE—of application for permission to participate set for 3/12/82.

DATE	NR.	PROCEEDINGS
1982		
Feb 22	—	LODGED—Order Granting Leave to Participate to Mr. Clancy.
Feb 22	36	DESIGNATION—of person to testify at deposition—David R. Clemens will testify for City of Renton on 3/3-4/82.
Feb 22	37	CERTIFICATE OF SERVICE—of the preceding 10 docket items on Jack Burns on 2/22/82 by mail.
Feb 24	—	ENT ORDER—(1) Defts' motion for hearing motion to dismiss before District Court Judge is DENIED. (2) Deft's motion to dismiss the complaint is hereby referred to Magistrate Sweigert for consideration. Counsel advised by mail.
Feb 24	38	ORDER—granting leave to participate to James J. Clancy on behalf of Defts. Counsel advised.
Feb 23	39	ORDER—(1) R&R approved and adopted; (2) Pltf's motion for TRO DENIED; and, (3) copies to all counsel and magistrate.
Feb 23	40	JUDGMENT—on Order referenced above. cc: Counsel and Magistrate.
Mar 1	41	AFFIDAVIT OF SERVICE—of deposition subpoena on David R. Clemens on 2/25/82.
Mar 2	42	LETTER—from Magistrate's office to counsel indicating oral argument will be heard on Deft's Motion to Dismiss on 3/12/82 before Magistrate Sweigert at 9:30 am.
Mar 2	43	ORDER—continuing Preliminary Injunction Hearing set for 3/19/82 until further notice. cc: Counsel.

DATE	NR.	PROCEEDINGS
1982		
Mar 2	44	OBJECTION—to inspection or copying pursuant to Subpoena Duces Tecum for David R. Clemens submitted by Defts. Certain material requested should be privilege as "Attorney-Client" re 'comprehensive report from the City Attorneys'.
Mar 2	45	CERTIFICATE OF MAILING—on 3/2/82 to Jack Burns of the noted objection.
Mar 8	46	MOTION—for leave to file a brief in excess of 20 pages. Complex issues are involved and the support memo was in excess of 20.
Mar 8	—	LODGED—Order allowing Pltf filing of excessively long brief.
Mar 8	—	LODGED—PLTFS MEMORANDUM—in opposition to Defts' motion to dismiss.
Mar 8	47	ORDER—granting leave to file a brief in excess of 20 pages. cc: Counsel.
Mar 8	48	PLTF'S MEMORANDUM—in opposition to Deft's Motion to dismiss.
Mar 11	49	REPLY MEMORANDUM—defts in support of defts motion to dismiss.
Mar 11	50	CERTIFICATE—of mailing.
*Mar 10	—	ENT ORDER—consolidating C82-263M (originally assigned to Rothstein) with this case, all originals to be filed in C82-59M.
Mar 12	—	HEARING—on Oral argument on Deft's motion to dismiss. Motion Denied. Magistrate to prepare R&R for McGovern. Margaret Walkky.

DATE	NR.	PROCEEDINGS
1982		
Mar 11	51	NOTICE—of Deposition of Roger H. Forbes on 3/19/82 by Deft. City of Renton.
Mar 12	52	OBJECTION TO REMOVAL AND MOTION—to Remand to State Court and for costs filed by Deft City of Renton.
Mar 12	53	MEMORANDUM—in support of Motion to remand to state court filed by Deft. City of Renton.
Mar 12	54	NOTICE—of motion to remand to state court to be heard by Magistrate Sweigert on 4/2/82.
Mar 15	55	ORDER OF REFERENCE—referring to Magistrate Motion on Remand. cc: Counsel.
*Mar 13	—	LETTER—from Pltf. counsel (Smith) to Magistrate requesting the court consider recent decision from similar issued in the District of Minnesota as part of Deft brief in opposition to Defts Motion to dismiss.
Mar 15	56	CERTIFICATE OF MAILING of copy of subpoena duces tecum to Jack Burnson on 3/12/82 by mail.
Mar 17	57	COPY OF LETTER to Mag. indicating hearing Motion For Remand will be heard on 4/9/82.
Mar 18	58	AFFIDAVIT OF SERVICE of Deposition subpoena on Roger H. Forbes for deposition on 3/19/82 at the request of Defts.
Mar 19	59	PLTF'S MOTION to dismiss Complaint in C82-263M (Where this Pltf is the deft.—More specifically the Playtime Theaters

DATE	NR.	PROCEEDINGS
1982		
		are requesting dismissal of Complaint filed by City of Renton).
Mar 19	60	NOTICE of Motion set for 4/9/82 before McGovern.
Mar 19	61	CERTIFICATE OF SERVICE of Notice of Motion and Motion to dismiss on Mr. Kellogg by mail on 3/18/82.
Mar 22	62	TRANSCRIPT of hearing on Deft's Motion to dismiss complaint in No. C82-59M held on 3/12/82 before Magistrate Sweigert.
Mar 24	63	ORDER OF REFERENCE of all pretrial issues and matters to Mag. Sweigert. All dates set before McGovern are suspended and to be reset by Magistrate. Copies to Cnsl & Mag.
*Mar 19	64	MEMORANDUM in support of Defts' (Playtime Theatres) Motion to dismiss Plaintiffs' (City of Renton) Complaint (in C82-263M) for declaratory Judgment.
Mar 25	65	COPY OF LETTER, Counsel indicating City of Renton's Motion to Dismiss will be heard with the Motion to remand on 4/9/82.
Mar 25	66	REPORT & RECOMMENDATION on Defendants (City of Renton) Motion to Dismiss.
Mar 25	—	LODGED—Order. To be submitted to McGovern on 4/8/82 if no objections are noted. (Denying Motion to Dismiss).
Mar 30	67	DEPOSITION of David R. Clemens, Volume I, taken on 3/3/82 at the request of Pltf (Playtime Theatres).

DATE	NR.	PROCEEDINGS
1982		
Mar 30	68	DEPOSITION of David R. Clemens, Volume II, taken on 3/4/82 at the request of Pltf (Playtime Theatres).
Apr 1	69	MEMORANDUM of Playtime Theatres Inc. and Kukio Bay Properties inc. in opposition to the City of Renton's motion to remand.
Apr 1	70	CERTIFICATE OF SERVICE of memorandum on Deft. counsel by mail.
Apr 6	71	BRIEF in opposition to Playtime's motion to dismiss City of Renton Complaint for declaratory judgment and in reply to Playtime memorandum in opposition to remand.
Apr 7	72	OBJECTIONS TO Magistrate's R&R on Defts' motion to dismiss from Deft's counsel.
Apr 7	73	NOTICE OF MOTION noting Defts' objections for 4/23/82 before Judge McGovern.
Apr 7	74	CERTIFICATE OF SERVICE of Objections and Notice to Pltf's cnsl by mail on 4/7/82.
Apr 9	75	ANSWER to Subpoena Duces Tecum filed by Pltf.
Apr 9	—	HEARING Oral Argument on Motion to Remand. Court will recommend to Judge McGovern that Pltf's motion to remand to State Court be granted and will file his report within one week (This motion was brought City of Renton).
Apr 19	76	PLTF'S RESPONSE to Defts' objections to Magistrate's R&R on Defts' Motion to dismiss.

DATE	NR.	PROCEEDINGS
1982		
May 5	77	ORDER (1) R&R approved and adopted; (2) Deft (City of Renton) motion to dismiss is denied. cc: Counsel and Magistrate.
May 4	78	DEFT (City of Renton) RENEWED MOTION to dismiss Pltfs' amended and supplemental complaint for preliminary and permanent injunction pursuant to FRCP 12(b) (6).
May 4	79	MEMORANDUM in support of Deft's renewed motion to dismiss Pltfs' amended and supplemental complaint for preliminary and permanent injunction pursuant to FRCP 12(b) (6).
May 4	80	NOTICE of renewed motion to dismiss set for 5/21/82 (oral request).
May 4	81	CERTIFICATE OF SERVICE of Motion; Memorandum and Notice on Jack Burns by mail on 5/4/82.
May 7	—	LETTER TO COUNSEL indicating oral argument on Deft's Motion to Dismiss will be changed from 5/21/82 to 1:30 pm 5/28/82. Response brief from Playtime Theatres is due 5/24/82.
May 10	—	LETTER TO COUNSEL setting Preliminary Injunction Hearing on 1:30 pm 6/23/82. Pltf's brief due 6/9/82; Deft's Brief due 6/16/82.
May 13	82	PLTF'S MOTION to compel production of documents and for terms.
May 13	83	MEMORANDUM in support of motion to compel production of documents and for terms.

DATE	NR.	PROCEEDINGS
1982		
May 13	84	CERTIFICATE of compliance re LR 37.
May 13	85	NOTICE of motion to compel production set for 5/28/82 before Mg. Sweigert.
May 14	86	CERTIFICATE OF SERVICE of Motion to compel, memo in support and Notice on Defense counsel by mail on 5/13/83.
May 19	87	NOTICE OF DEPOSITION of Rogert H. Forbes by Deft in Kirkland, WA on 5/27/82 at 10:00 am. sub. issued.
May 24	88	MEMORANDUM in opposition to Defts' renewed motion to dismiss.
May 24	89	CERTIFICATE OF SERVICE of memo in opposition on Mr. Kellogg by mail on 5/21/82.
May 24	90	AFFIDAVIT OF SERVICE of subpoena duces tecum on Forbes served 5/19/82 on Jack Burns, attorney.
May 24	91	RESPONSE in opposition to Pltfs motion to compel production of documents and for terms.
May 24	92	AFFIDAVIT of Lawrence J. Warren in response to Pltfs motion to compel production of documents and for terms.
May 24	93	AFFIDAVIT of Daniel Kellogg in opposition to Pltfs' motion to compel production of documents and for terms.
May 27	94	AFFIDAVIT OF SERVICE of Response in Opp to Pltf's Motion to Compel; affidavit of Warrent and Kellog on Jack Burns on 5/24/82.
May 27	95	DEFTS' MOTION for summary judgment (FRCP 56).

DATE	NR.	PROCEEDINGS
1982		
May 27	96	MEMORANDUM in support of Motion for SJ.
May 27	97	AFFIDAVIT of David R. Clemens in support of City of Renton's motion for SJ.
May 27	98	NOTICE of Deft's motion for SJ (before Sweigert) on 6/18/82.
May 27	99	CERTIFICATE OF SERVICE of the Motion for SJ, memo and affidavit on Mr. Burns by mail on 5/27/82.
June 1	100	MEMORANDUM ORDER (1) Granting in part Pltf's motion to compel production (map to be produced, ruling on memo reserved) cc: Counsel.
June 3	101	BRIEFING SCHEDULE (1) Deft Response Pleading 6/9/82; (2) Pltf Reply Brief, Preliminary Injunction Brief, and Response to Deft's Motion for SJ 6/15/82; (3) all designate live testimony/experts for Preliminary Injunction Hearing 6/15/82; and, (4) Deft's response to Pltf's Preliminary Injunction brief 6/21/82.
June 7	102	ORDER granting pltf's motion to compel production of memo. CC: COUNSEL.
June 8	103	NOTICE OF DEPOSITION of Lisa Puddy by Defts in Renton, WA on 6/16/82.
June 8	104	NOTICE OF DEPOSITION of Playtime Theatres, Inc. representative (for advertising) by Deft in Renton, WA on 6/16/82.
June 8	105	CERTIFICATE OF SERVICE of Notice of depositions and request for production of documents on Pltf's counsel by mail on 6/8/82.

DATE	NR.	PROCEEDINGS
1982		
June 8	106	PRAECIPE issue subpoenas for depts of Puddy and Playtime rep. Issued.
June 9	107	DEFTS' ANSWER to Pltfs' Amended Complaint for Declaratory Judgment and Preliminary and Permanent injunction.
June 10	108	AFFIDAVIT OF SERVICE of dep subpoena on Jack R. Burns (via Mrs. Burns) on 6/8/82.
June 10	109	AFFIDAVIT OF SERVICE of dep subpoena on Lisa Puddy on 6/8/82.
Jun 15	110	MOTION—pltfs for leave to file a brief in excess of 20 pages.
Jun 15	—	LODGED BRIEF—of Playtime Theatres, Inc and Kukio Bay Properties Inc. in response to motion for preliminary injunction and in opposition to depts motion for sj.
Jun 15	111	AFFIDAVIT of Bruce Anderson in support of pltfs motion for preliminary inj.
Jun 15	112	AFFIDAVIT—of Robert F. Bond.
Jun 15	113	DESIGNATION—of live testimony of Jimmy Johnson.
Jun 15	114	REPLY—pltfs of Playtime Theatres, Inc and Kukio Bay Properties, Inc. to the Defts answers to pltfs amended and supplemental complaint for declaratory judgment.
Jun 15	115	RESPONSE—to subpoena duces tecum.
Jun 15	—	LODGED ORDER.
June 15	116	DESIGNATION—of Testimony and experts to be called by deft at the preliminary injunction hearing.

DATE	NR.	PROCEEDINGS
1982		
Jun 15	117	CERTIFICATE—of service.
Jun 17	118	BRIEF of Playtime Theatres, Inc. and Kikio Bay Properties Inc. in support of motion for preliminary injunction and in opposition to Defts' Motion for SJ.
Jun 21	119	DEFTS' REPLY BRIEF in opposition to Motion for Preliminary Injunction and in support of Defts' Motion for SJ.
Jun 21	120	AFFIDAVIT of Delores A. Mead.
Jun 21	121	NOTICE of intent to move the Court to strike Pltfs' brief and motion for preliminary injunction.
Jun 21	122	OBJECTIONS to the affidavit of Bruce Anderson in support of PLTFS' motion for preliminary injunction.
Jun 21	123	OBJECTIONS to the affidavit of Robert F. Bond.
Jun 21	124	AFFIDAVIT of Mark E. Barber.
Jun 23	125	NOTICE OF CHANGE of address filed by Pltf's counsel, Mr. Burns.
Jun 23	—	HEARING ON PENDING MOTIONS: Motion (D) to strike Pltf's brief Denied. DFT's motion to strike testimony of Jimmy Johnson DENIED. Deft makes motion Mr. Forbes not testify GRANTED. Deft motion for time to 6/28/82 to respond to excerpts of dep GRANTED.
Jun 24	126	ORDER Pltf's motion to file a brief in excess of 20 pages is DENIED. cc Counsel.
Jun 28	127	CITY OF RENTON's OBJECTIONS to Pltf's designation of Deposition testimony.

DATE	NR.	PROCEEDINGS
1982		
July 1	128	AFFIDAVIT OF SERVICE of City's objections on Pltf's counsel.
July 16	129	MOTION and affidavit for leave to file supplemental brief in support of Defts motion for SJ and in opposition to Pltfs' motion for Preliminary Injunction.
July 16	130	NOTICE of motion for leave to file supplemental brief in support of Defts motion for SJ and in opposition to Pltfs' motion for preliminary injunction set for 8/6/82 before Magistrate.
July 16	131	CERTIFICATE OF SERVICE of motion and notice on Pltf's counsel.
Jul 29	132	MEMORANDUM—of pltf in opposition to defts motion for leave to file supp brief.
Jul 29	133	CERTIFICATE—of service.
Sep 2	134	DEPOSITION—of Lisa M. Puddy at defts instance.
Sep 2	135	DEPOSITION—of Roger H. Forbes on 4-9-82 at defts instance.
Sep 2	136	DEPOSITION—of Roger H. Forbes on May 27, 1982 at defts instance with unattached exhibits.
Sep 16	137	ADDITIONAL AUTHORITIES—of pltf in support of motion for preliminary injunction.
Sep 16	138	CERTIFICATE—of service.
Sep 24	139	RESPONSE—of city of Renton to pltf's additional authorities in support of its motion for preliminary injunction.
Sep 24	140	CERTIFICATE—of service.

DATE	NR.	PROCEEDINGS
1982		
Oct 26	141	CERTIFICATE—of service of cy of ltr to Mag Sweigert on defts by pltf.
Nov 5	142	REPORT & RECOMMENDATION—of Magistrate Sweigert . . . recommending Court enjoin enforcement of the city ordinance pending disposition on the merits . . . obj by 11-19-82.
Nov 5	—	LODGED—order.
Nov 15	143	OBJECTIONS—of defts to Mag's R&R on defts motion for S/J and renewed motion to dismiss, and pltfs motion for preliminary injunction.
Nov 15	144	MOTION—of deft City of Renton for review of Mag's R&R denying defts motion for S/J and renewed motion to dismiss and granting pltfs motion for preliminary injunction.
Nov 15	145	NOTICE—of motion and objections 12-3-82.
Nov 15	146	CERTIFICATE—of service of #143-145.
Nov 24	147	RESPONSE—of Playtime Theatres and Kukio Bay Prop. to Renton's objections to R&R re Preliminary injunction.
Nov 24	148	CERTIFICATE—of service of #147.
Dec 2	—	Received copy of City of Renton's petition for writ of mandamus submitted to CCA.
Dec 6	149	REPLY—of Renton to pltf's response to Renton's objections to R&R re preliminary injunction.
Dec 6	150	CERTIFICATE—of service of #149.
Dec 9	151	SUPPLEMENTAL R & R—of Mag. Sweigert obj by 12-23-82.

DATE	NR.	PROCEEDINGS
1982		
**Sep 8	152	TRANSCRIPT—of proceedings before Mag. Sweigert 6-23-82.
Dec 20	153	MOTION—of City for review of Mag.s suppl R&R of 12-9-82 1-7-83.
Dec 20	154	OBJECTIONS—of City to Mags. suppl R&R of 12-9-82.
Dec 20	155	NOTICE—of objections 1-7-83.
Dec 20	156	CERTIFICATE—of service of #153-155.
1983		
Jan 13	157	ORDER—denying defts' motions to dismiss and for summary judgment and granting preliminary injunction pendente lite cys mld 1-14-83.
Jan 13	158	ORDER—REMANDING C82-263M to King County Superior Court cys mld 1-14-83.
Feb 8	159	STIPULATED ORDER—severing damages from pltf's prayer for permanent inj . . . setting hearing on pltf's prayer for permanent inj for 2-10-83 at 2 pm cnsl adv JM cys of order mld 2-9-83.
Feb 9	160	SUPPLEMENTAL CITATION—of authorities in support of permanent injunction by pltf.
Jan 27	—	Received copy of supplement to petition for writ of mandamus and/or writ of prohibition as submitted to CCA on perm inj.
Feb 10	—	HEARING—Keith White, reporter . . . argument heard . . . court will give written decision as soon as possible. . .
Feb 11	161	MOTION—of City to file supplemental points and auth.

DATE	NR.	PROCEEDINGS
1983		
Feb 11	—	LODGED—memorandum of points & auth in support of defts contention that prelim inj was improvidently granted, and that perm inj must be denied.
Feb 11	—	LODGED—order granting filing of supp points & auth.
Feb 11	162	CERTIFICATE—of service.
Feb 11	163	APPEAL—notice by City from order denying defts motions to dismiss and for s/j and granting prelim inj pendente lite (#157) (3643).
Feb 11	164	CERTIFICATE—of service of #163.
Feb 14	165	ORDER—permitting defts to file sup points & auth cys mld 2-14-83.
Feb 14	166	MEMORANDUM—of points and auth in support of defts contention the prelim inj was improvidently granted and the perm inj must be denied.
Feb 16	—	Notified CCA and cnsl of filing of appeal.
Feb 18	167	ORDER—of WTM vacating the order granting preliminary injunction, plaintiff's prayer for permanent injunction against enforcement of ordinance is denied . . . City of Rentons motion to dismiss for lack of jurisdiction is denied and its motion for summary judgment is granted . . . cnsl adv 2-18-83.
Feb 18	168	JUDGEMENT—DENYING pltf's prayer for perm inj . . . DENYING City's motion to dismiss . . . GRANTING City's motion for s/j entered & cys mld 2-22-83.
**Feb 17	166a	SUPPLEMENTAL AUTHORITY—in support of pltf's prayer for perm inj.

DATE	NR.	PROCEEDINGS
1983		
**Feb 17	166b	CERTIFICATE—of service of #166a.
Feb 25	169	CERTIFICATE—of service of trans desig and order form.
Feb 25	170	MOTION—of pltfs for stay (injunction) pending appeal 3-18-83.
Feb 25	171	MOTION—of pltfs to alter or amend judgment 3-18-83.
Feb 25	172	MEMORANDUM—in support of motion to alter or amend judgment.
Feb 25	173	CERTIFICATE—of service of #170-172.
Mar 4	174	DESIGNATION—of transcript and order form for 3 separate hearings.
Mar 4	175	CERTIFICATE—of service of #174.
Mar 14	176	RESPONSE—defts to pltfs memornadum in support of pltfs motion to alter or amend judgment denying pltfs prayer for a permanant injunction against the enforcement of Renton Ordinance No. 3637.
Mar 14	177	CERTIFICATE—of service.
Apr 6	178	TRANSCRIPT—of proceedings before Mag. Sweigert on 6-23-82 (Keith White).
Apr 8	179	CITATION—by pltf of additional authorities.
Apr 8	180	CERTIFICATE—of service of #179.
Apr 18	181	MOTION—of City for leave to file supplemental points & authorities in the response of City to pltfs motion to alter or amend judgment...
Apr 18	—	MEMORANDUM LODGED—in support of defts contention that prelim inj was im-

DATE	NR.	PROCEEDINGS
1983		
		providently granted and that PI must be denied.
Apr 18	—	LODGED—order permitting defts to file supplemental points.
Apr 18	182	CERTIFICATE—of service of above lodged items.
Apr 19	183	TRANSCRIPT—of hearing on motion for TRO before Mag. Sweigert on 1-29-82.
Apr 19	—	Received copy of certificate of record as to #183 . . . mailed original to CCA.
Apr 20	184	ORDER—permitting defts to file supp points and authorities cys mld 4-21-83.
Apr 20	185	MEMORANDUM—of supplemental points and authoritesin support of defts contention that PI was improvidently granted and the PI must be denied.
Apr 29	186	ORDER—denying pltf's motions to alter and amend judgment and for stay pending appeal cys mld 4-29-83.
May 10	187	APPEAL—notice by pltfs from judgment entered 2-18-83 and from order of 4-29-83.
May 10	188	CERTIFICATE—of service of #187.
May 11	—	Notified CCA and cnsl of filing of appeal.
May 31	189	ORDER—of CCA in 83-3643 . . . parties are to file memoranda addressing issue of whether this appeal is moot . . . to be mailed by 6-15-83. . . .
Jun 6	190	TRANSCRIPT DESIGNATION—of pltf for appeal 83-3805 (will use transcripts ordered for previous appeal).

DATE	NR.	PROCEEDINGS
1983		
Jun 17	191	ORDER—of CCA (83-3805) denying appellants' motion for stay or injunction pending appeal. . .
Jul 25	—	Mailed CCA cert of record for appeal 83-3805 with cy of #190.
Aug 3	192	ORDER—of CCA (83-3805) setting briefing sked . . . appellants brief by 10-21-83 . . . appellees brief by 12-19-83 . . . reply brief w/in 21 days of service date of appellees brief . . . appeal to be argued in Feb or Mar of 1984.
Sep 6	193	ORDER—of CCA (83-3805) consolidating this appeal with CCA83-3980 (C83-744C) for all purposes . . . briefing sked set in 83-3805 will apply. . .
Sep 23	194	ORDER AND JUDGMENT—from CCA (83-3643) dismissing appeal as moot . . . entered and cys mld 9-26-83.
Nov 2	195	TRANSCRIPT—of proceedings before Judge McGovern on 2-10-83.
Nov. 8	196	DESIGNATION—of clerk's record by pltf/appellant (3805).
Nov 9	197	ORDER—of CCA (3805/3980) granting appellant's motion for extension of time to file opening brief . . . appellants to file brief by 11-11-83 . . . appellees brief due 1-16-84. . .
1984		
Jan 16	198	ORDER—of CCA . . . appellee City's motion to extend brief filing time to 2-15-84 is granted . . . appellant Playtime's motion for extension of time is denied as moot

DATE	NR.	PROCEEDINGS
1984		
		. . . appellants reply brief due 21 days of service date of appellees brief.
Apr 19	199	DESIGNATION—of clerk's record by appellee.
Apr 24	—	Submitted copy of designated record to Vivian Thompson, Circuit office in Seattle per verbal instructions of Betty Parshall of San Francisco. Cnsl advised of submission.
Apr 25	—	Hand delivered the designated trial exhibits to Vivian Thompson, Circuit office in Seattle.
Dec 24	200	JUDGMENT of CCA that judgment of DC is reversed in part, 83-3805 remanded in part. (ent 12/26/84) cc to WTM, cnsl. (Copy in C83-744C).
1985		
Jan 4	201	JUDGMENT from CCA that costs in amt of \$1,098.20 are taxed against City of Renton, appellee, for Playtime Theatres, appellant. (ent & mailed 1/4/85).
1/3/85	202	MOTION of pltf for entry of judgment NOTED: 1/18/85.
"	203	MEMORANDUM of points & authorities in support of #202.
1/12/85	204	MOTION of defts for stay of proceedings Note date incorrect—cnsl called.
"	205	OBJECTION of defts to mtn for entry of judgment or alternatively request for addtl time to respond.
"	206	CERTIFICATE of srvc of #204 & 205.

PLAYTIME THEATRES, INC., a Washington corporation,
and
KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiffs,
vs.
THE CITY OF RENTON, *et al.,*
Defendants.

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I am the Policy Development Director of the City of Renton. Commencing on January 5, 1981 and continuing until December 1, 1981, I was the Acting Planning Director of the City of Renton.

The City of Renton is located at the southeast end of Lake Washington. The 1981 population of the City is 32,200; the extended service area of the City of Renton is approximately 70,000 persons. The population of the City during daytime, including the large industrial manufacturing plants of The Boeing Company and Pacific Car

& Foundry Company, is approximately 50,000 persons. The City of Renton comprises 15.3 square miles. The Renton School District No. 403, whose boundaries are not identical with the city limits of the City of Renton, but are clearly within the service area of the City of Renton, has 14 elementary schools, 3 middle schools and 3 high schools, together with special and alternative education facilities and a vocational-technical institution. Within the city limits are 62 churches representing all major denominations. The City has recreational facilities including 18 parks, including two waterfront parks on Lake Washington, 3 public swimming pools and the Cedar River Trail which includes an existing path for joggers, etc., and a nature trail along the Cedar River which is being developed. The senior citizens recreation center on the Cedar River is a principal recreation source for senior citizens and the surrounding service area. Shopping and commercial activity areas are located throughout the community in neighborhood shopping center clusters, with major shopping facilities being divided into four major nodes: the downtown business district along Second and Third Avenues; the Renton Shopping Center located along Rainier Avenue; the Renton Village Shopping Center located along Grady Way; and the Highlands shopping area located along Sunset Boulevard Northeast. Land uses within the City of Renton as of October 1980 are estimated to occupy the following acres within the City of Renton:

Single family residential	2025
Multi-family residential	415
Commercial	385
Public—quasi-public	570
Parks and recreation	500
Agricultural	90
Industrial	1205
Major arterials and freeways	710
Undeveloped	3735
TOTAL	9635

One of my principal responsibilities is to assist the Mayor's office and the City Council to study and implement land use regulations within the City of Renton. I have personal knowledge of the matters relating to the development of the land use regulations which were ultimately adopted as Ordinance No. 3526. I was present at all meeting of the City Council and its Planning and Development Committee, and in particular the public meeting that was held on March 5, 1981 at which time the City Council took comments from interested citizens, educators, clergymen and businessmen on this subject matter.

The City Council dealt with the issue of regulation of adult entertainment land uses without the influence of a pending adult entertainment land use proposal. The Council considered comments from the land use planning professionals in my office as well as a comprehensive report from the City Attorney's office relating to the proper scope of land use regulations and experience from other cities. At all times, the City Council was advised that it was inappropriate to entirely ban adult entertainment land use from the City.

After the Committee had concluded its study of the alternatives which were available to the City for regulation of adult entertainment land uses, the Committee sought comment from the general public on the matter at a public meeting held on March 5, 1981. Sixty-four (64) persons were in attendance, with 28 persons speaking on the issue. In attendance were residents of the city, residents of other areas outside the city who use the City of Renton for shopping and employment, educators, including the Superintendent of the Renton School system, clergymen from churches within the City and the surrounding area, representatives of the local feminist organization and members of the business and professional community including the Manager of the Greater Renton Chamber of Commerce. The testimony presented to the Committee consistently noted adverse impact upon neigh-

borhoods and businesses within the City of Renton in the event that an adult entertainment land use was situated in close proximity to schools, churches, public or quasi-public buildings, businesses, and residential zones or uses. Numerous speakers, including the Superintendent of schools, expressed concern about the adverse effect caused by children walking past and in the vicinity of adult entertainment land uses on their way to and from school. Several speakers noted that adult theaters and other similar uses are not similar to other commercial activities in that their impact extends beyond the limits of the immediate location. As a result, the general population of the City of Renton is confronted with an intrusion into its life style of an activity over which it may have little control. In effect, even if the general population chooses not to patronize the establishment, the adverse effect upon the community still remains. Several speakers commented upon the adverse impacts which adult entertainment land uses would have upon property values within the business and residential community of the City of Renton if such uses were allowed in close proximity to the uses mentioned above. At more than one point speakers noted the deterioration of business and community neighborhoods in the City of Seattle which had recently prompted Seattle to impose location regulations upon adult theaters. The proximity between the location of schools and the location of adult theaters was a point of serious concern to many individuals present. The Renton School District provides bussing service for elementary students whose homes are located more than one mile from the school. That was the basis of the City Council's adoption in the ordinance of the one-mile radius from schools. Several speakers noted that they choose to walk to stores, churches or other public services in their neighborhoods as an alternative to driving their car. Later reports to the Committee from my office provided the information that public transit and retail service reports show that the maximum distance the average person will walk to public

transit or shopping activities is one quarter mile. This was the basis for adoption of the 1000 foot radius from residential, churches, or public and quasi-public uses.

The Planning and Development Committee later met to evaluate the comments received at the public meeting and from staff. Their conclusion was that the public had expressed sufficient concern and provided detailed examples from the City of Seattle, Tacoma and other cities to conclude that adult motion picture theaters should be regulated within the City of Renton on the basis of location. The Committee further concluded that the area of most concern to the committee was the protection and preservation of its residential areas and the accessory land uses such as schools, parks, churches and other public and quasi-public land uses.

The Planning and Development Committee presented its recommendation to the full Council of the City of Renton. The full City Council considered the report of the Planning and Development Committee, including the issues which had been previously raised by the city staff and the public at the public meetings. Based upon the comments, recommendations and debate on the floor of the Committee, the City Council adopted the proposed ordinance on April 23, 1981 as Ordinance No. 3526.

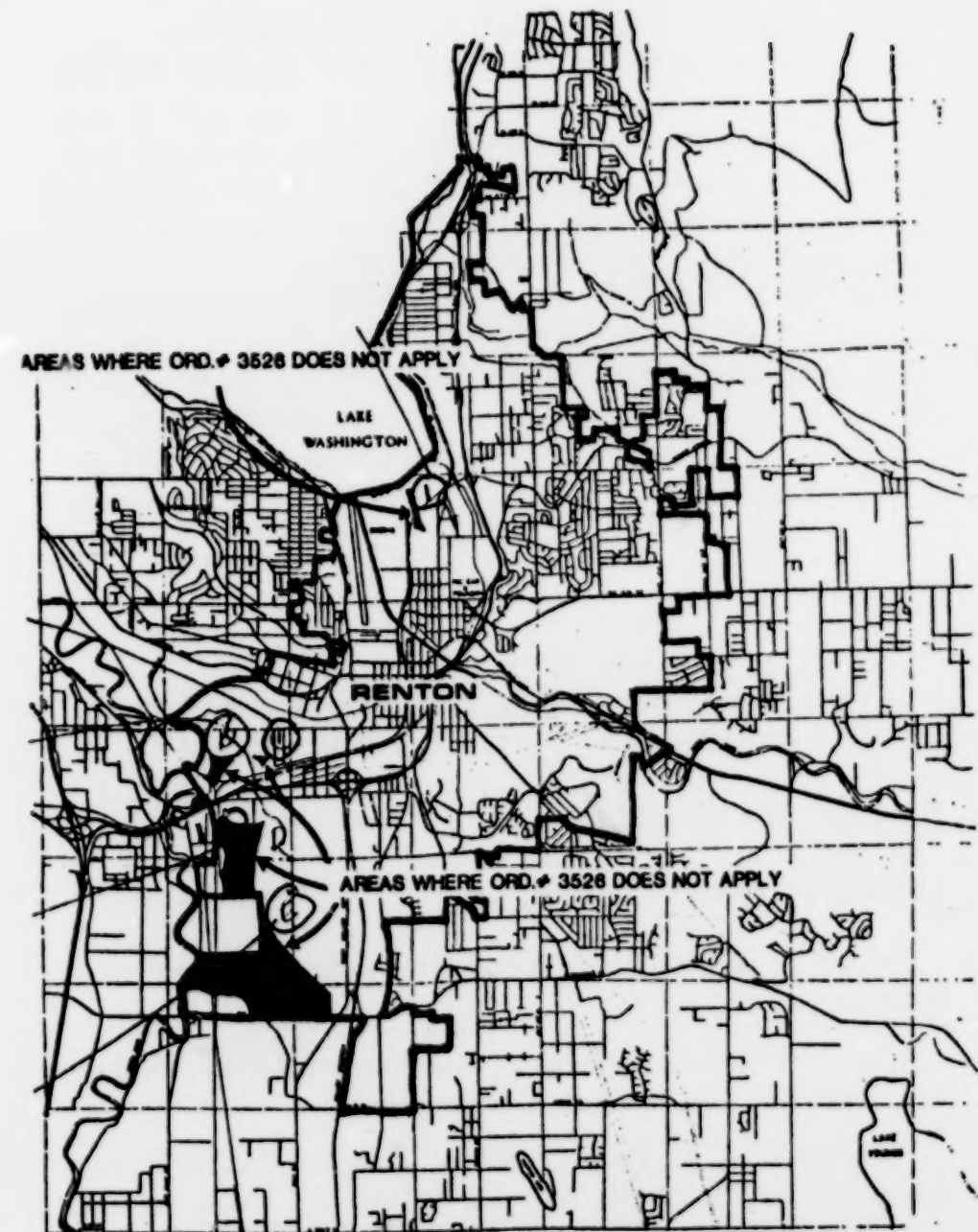
The adoption of the ordinance was based upon good zoning principles and was founded upon extensive public testimony and research of such matters of location regulation of adult entertainment land uses. The Council adopted standards for location of adult entertainment land uses based upon the express concern that certain types of land use activities, parks, residential neighborhoods, schools and churches would be adversely impacted by adult motion picture theaters. As a result, the Council developed criteria for location of adult theaters in order that they would not improperly and adversely effect the stability of the community of the City of Renton.

The location regulations adopted in Ordinance No. 3526 do not eliminate the location of an adult theater within the City of Renton. As illustrated on the attached map of the City of Renton, there is approximately 400 acres of land within the City of Renton which does not fall within the location regulations. With two exceptions, the property in question is undeveloped. Most of the parcels of property within the 400 acres is appropriately zoned for adult theater use. Furthermore, pursuant to the Comprehensive Plan of the City of Renton, all of the locations are designated as being appropriate for commercial activities, thus paving the way for re-zoning of those properties which are not presently zoned for adult theater uses.

By way of comparison, the ordinance of the City of Seattle which has been upheld by the Washington State Supreme Court provides an area of only 250 acres in the central business district of the City in which adult theaters may be located. The City of Seattle has a total acreage of 56,320 acres. The area available for adult theaters comprises less than .044% of the total acreage in the City. On the contrary, the City of Renton has a total average of 9,635 acres with approximately 400 acres or 4.1% of the City's land area available for development of adult theaters. This is nearly ten times the proportionate area of the City of Seattle. Renton's population is 7% of Seattle's.

The result of the location regulations set forth in the ordinance is an ordinance which will protect the vitality, economic health and business welfare of its citizens from adverse effects of adult theater uses, without prohibiting the rights of its citizens to patronize such theaters if the uses choose to locate within the City of Renton. In any event, adult entertainment uses are widely available within the City of Seattle and King County generally.

* * * *



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C82-59M

PLAYTIME THEATRES, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.*,
Defendants.

**AFFIDAVIT OF GARY F. KOHLWES,
SUPERINTENDENT OF RENTON SCHOOL DISTRICT
AND SECRETARY OF RENTON SCHOOL BOARD**

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

GARY F. KOHLWES, being first duly sworn on oath,
deposes and states:

I am the Superintendent of the Renton School District
and Secretary of the Renton School Board.

The position of Renton School District No. 403 was
presented at the public meeting before the Planning and
Development Committee of the Renton City Council on
March 5, 1981, and remains the same to this date. The
School District strongly supports the regulation as
adopted by the City Council of the City of Renton to
prohibit the location of an "adult motion picture theater"
within a radius of one mile surrounding a public school.

The regulations of the School District covering student
transportation varies by grade level. Students in kinder-
garten through sixth grade are transported by bus if
they reside one mile or more from their school. Students
in grades 7 and 8 are transported by bus if they reside
more than 1.5 miles from their school. Students in grades
9 through 12 are transported if they reside more than
two miles from their school. The intention of the School
Board in imposing the one mile location on "adult motion
picture theaters" was to prevent negative impact upon
elementary school children walking to and from school.
This position was reaffirmed by the Renton School Board
at its regularly scheduled meeting on January 21, 1982.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C82-0059M

PLAYTIME THEATRES, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.*,
Defendants.

**AFFIDAVIT IN SUPPORT OF MOTIONS FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

Jack R. Burns, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for the plaintiffs herein and I am authorized to make this affidavit on their behalf in support of their motion for a Temporary Restraining Order and their motion for a Preliminary Injunction.

2. Since the filing of the Complaint herein, your affiant has had an opportunity to review the legislative history of City of Renton Ordinance No. 3526 by reviewing the record generally available to the public. Excerpts of the Minutes of the Renton City Council relating to this Ordinance and other pertinent documents are attached

hereto as Exhibits 1 through 12 and are incorporated herein by reference. These exhibits reveal the following legislative history:

(1) Exhibit 1 reflects that on June 23, 1980 the Renton City Council undertook to study the subject of adult book stores, films and novelty shops by referring that matter to the Planning and Development Committee of the City Council.

(2) On September 8, 1980, as disclosed by Exhibit 2, the Planning and Development Committee of the City Council recommended to the City Council that the matter be referred to the Planning Commission for consideration. That recommendation was adopted by the Renton City Council at their meeting of September 8, 1980 and the matter was referred to the Planning Commission for consideration at the earliest possible date and for the holding of public hearings. This action is documented in Exhibit 3.

(3) The Minutes of the Renton City Council of October 13, 1980 indicate that on that date a moratorium resolution was adopted relative to the licensing of businesses selling or showing sexually explicit materials. The relevant portions of the Minutes of October 13, 1980 are attached hereto as Exhibit 4.

(4) Exhibit 5 is a copy of Resolution No. 2368 which places a moratorium on the issuance of business licenses to businesses selling or showing sexually explicit materials. To the extent that any government interest is set forth in the legislative history of City of Renton Ordinance No. 3526, it is contained in the "whereas" provisions of Resolution No. 2368. There, the only reason asserted for the ordinance is an undocumented, unstudied, and speculative perception that a business which sells, rents or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences.

(5) The Renton City Council Minutes of December 1, 1980, Exhibit 6, indicate that the chairman of the Planning Commission referred the adult entertainment matter back to the Council for further action indicating that the Planning Commission is overburdened with priorities of a much greater magnitude than the regulation of adult entertainment land uses.

(6) The Renton City Council Minutes of February 9, 1981, Exhibit 7, indicate that the public did not respond to notices of a meeting to consider adult entertainment land use regulation. Accordingly, another meeting was scheduled for March 5, 1981. Exhibit 8 is a copy of the public notice for the March 5, 1981 meeting. As associate of your affiant, Glenna Bradley-House, has been advised that no more than a dozen members of the public attended the public meeting had on March 5, 1981.

(7) On April 6, 1981 the Planning and Development Committee of the Renton City Council filed its report relative to adult entertainment land use. This report is Exhibit 9 in the materials attached hereto. The report sets forth no findings relative to the need for such an ordinance nor does it spell out in any way any compelling governmental interest that would be served by the regulation of adult uses. Finally, no reasons or need are specified for the locational requirements suggested by the report. From this record, it is impossible to determine from the legislative history that the means chosen to implement a compelling governmental interest (if there be one) are the least intrusive to First Amendment freedoms and that there is a clear, direct and definitive connection between the means and the end.

(8) Exhibit 10 is an excerpt of the Renton City Council Minutes of April 6, 1981 wherein the report of the Planning and Development Committee is received and the Council concurs in its recommendation and forwards it to the Ways and Means Committee for preparation of an ordinance. Exhibit 11 is an excerpt of the Renton City Council Minutes of April 13, 1981 wherein Ordinance No. 3526 had its second reading and was adopted by the Renton City Council.

nance No. 3526 had its second reading and was adopted by the Renton City Council.

(9) Attached hereto as Exhibit 12 is a copy of Ordinance No. 3526. Nowhere in the body of that ordinance are there findings of any sort which set forth or describe a governmental interest of any sort, let alone a compelling governmental interest, which would justify a burden on protected First Amendment freedoms.

(10) Any restraint or burden upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality. The city must bear the burden of showing a compelling governmental interest. The legislative history of Ordinance No. 3526 is barren of any governmental interest being asserted, let alone one that would justify the broad and sweeping intrusion upon protected First Amendment expression that Ordinance No. 3526 accomplishes.

* * * *

EXHIBIT 1

Renton City Council
6/23/80 Page 3
Consent Agenda—Continued

* * * *

Areas of Location Adult Films, etc.

MOVED BY STREDICKE, SECOND TRIMM, THE
SUBJECT OF ADULT BOOKSTORES, FILMS
AND NOVELTY SHOPS BE REFERRED TO
PLANNING AND DEVELOPMENT COMMIT-
TEE. CARRIED.

* * * *

EXHIBIT 2

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
SEPTEMBER 8, 1980

*REGULATION OF ADULT ENTERTAINMENT LAND
USES* (referred 6/23/80)

The Planning and Development Committee has considered the question of regulation of adult entertainment land uses and recommends that the City Council refer the matter to the Planning Commission for consideration at the earliest possible date. The Committee recommends that the Planning Commission be directed to hold public hearings at the earliest possible date on the subject of possible amendments to the Comprehensive Plan and amendments to the Zoning Code as may be desirable to regulate adult entertainment land uses within the City of Renton.

/s/ Randy Rockhill

RANDY ROCKHILL, Chairman

EARL CLYMER

JOHN REED

EXHIBIT 3

Renton City Council

9/8/80 Page

Consent Agenda

* * * *

Adult Entertainment Land Uses

Planning and Development Committee report recommended referral of matter re regulation of adult entertainment land uses to the *Planning Commission* for consideration at the earliest possible date and hold a public hearing for possible amendments to the Comprehensive Plan and zoning code. MOVED BY ROCKHILL, SECOND REED, TO CONCUR IN THE COMMITTEE RECOMMENDATION. CARRIED.

* * * *

EXHIBIT 4

Renton City Council

10/13/80 Page

Old Business—Continued

* * * *

Resolution #2368 Moratorium Licensing of Adult Entertainment

A resolution was read declaring a 120 day moratorium on the licensing of businesses selling or showing sexually explicit materials, containing automatic extension of 90 days should pending Planning Commission report. MOVED BY STREDICKE, SECOND CLYMER, ADOPT THE RESOLUTION AS READ. CARRIED.

* * * *

EXHIBIT 5

RESOLUTION NO. 2368

A RESOLUTION OF THE CITY OF
RENTON, WASHINGTON, DECLARING
A MORATORIUM ON THE LICENSING OF
BUSINESSES SELLING OR SHOWING SEXUALLY
EXPLICIT MATERIALS

WHEREAS the City of Renton is a residential city with a discreet business area; and

WHEREAS the residential areas and the business areas, in all instances, are located in close proximity to one another; and

WHEREAS sexually explicit material, including books, magazines, pictures, and movies, whether sold, rented, or showed on premises, may legitimately be controlled by a municipality, either through gathering in one location, or separating from other uses which will be inordinately impacted by the sale, rental or showing of sexually explicit materials; and

WHEREAS the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials; and

WHEREAS the subject matter has been referred to the Planning Commission of the City of Renton for study and report back; and

WHEREAS the establishment of a business which, as its primary purpose, sells, rents, or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences:

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF RENTON DO RESOLVE AS FOLLOWS:

1. The above findings are found to be true and correct in all respects.

2. There is hereby established a moratorium against the granting of any business license to any business to be established within the City Limits of the City of Renton, which business has as its primary purpose the selling, renting or showing of sexually explicit materials. Such moratorium shall be in effect for the period of one hundred twenty (120) days, but shall be automatically extended for a period of further ninety (90) days, should a report and recommendadion from the Renton Planning Commission not be received by the Renton City Council, and acted upon by the Council, within such time period.

3. *Definition.* For the purpose of this Resolution sexually explicit materials shall be those materials which show, portray, describe or otherwise primarily relate to sexual intercourse, or excretory functions, or which portray or show male or female genitalia, the breasts, anus, buttocks, and which are primarily intended to appeal to the erotic interest, whether or not the same could be defined as obscene or not.

PASSED BY THE CITY COUNCIL this 13th day of October, 1980.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 13th day of October, 1980.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

EXHIBIT 6

Renton City Council

12/1/80 Page

* * *

Adult Entertainment Land Uses

Letter from Planning Commission Chairman Michael Porter acknowledged consideration of Council referral of adult entertainment land uses by its Special Studies Committee. The Commission concurred in the recommendation of the Committee to refer the matter back to the Council for further action, suggesting Council Committee and citizens' committee. The letter stated the Commission is overburdened with priorities in need of immediate action and regretted inability to handle the referral. Refer Adult Entertainment Land Uses to the *Planning and Development Committee*.

* * *

EXHIBIT 7

Renton City Council

2/9/81 Page

Old Business—Continued

* * *

Planning and Development Adult Entertainment

Planning and Development Committee Chairman Rockhill reported that the public did not respond to notices of meeting on adult entertainment land use. Rockhill rescheduled meeting for 3/5/81 4:30 p.m. for meeting with the public.

* * *

EXHIBIT 8

THE RENTON CITY COUNCIL
Municipal Building • 200 Mill Avenue South
Renton, Washington 98055 • 235-2586

February 10, 1981

NOTICE OF PUBLIC MEETING
PLANNING & DEVELOPMENT COMMITTEE
RENTON CITY COUNCIL

DATE: March 5, 1981

TIME: 4:30 P.M.

PLACE: Sixth Floor Conference Room
Municipal Building
200 Mill Avenue South
Renton, Washington

PURPOSE OF MEETING

The Renton City Council's Planning & Development Committee will review the subject of adult entertainment land uses.

Representatives from the general business community and interested citizens are invited. The meeting will be informal. Input may be given orally or in writing. If you have any question, please phone the Council secretary at 235-2586.

RANDY ROCKHILL, Chairman
Planning & Development Committee

cc: Planning Department
Planning Commission
Police Department
City Attorney

EXHIBIT 9

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
APRIL 6, 1981

ADULT ENTERTAINMENT LAND USE—
(Referred 12/1/80)

The Planning and Development Committee, after considerable review of this subject, including two meetings where public input was received, feel that it is in the best interest of the City of Renton and the desire of its citizens to provide regulation for the so-called adult motion picture theater location.

Therefore the Committee recommends:

1. That the Council concur and refer the subject to the Ways and Means Committee for the appropriate ordinance.
2. That the ordinance be written to reflect the following desired conditions:
 - a. No adult motion picture theater will be allowed in any area used or zoned residential or in any P-1 public use area.
 - b. A suitable buffer strip of 1000 feet from any residential or P-1 area also be a banned area.
 - c. The area enclosed in a one mile radius of any school (this is the minimum student walking distance) would also be a banned area.

RANDY ROCKHILL, Chairman

EARL CLYMER

JOHN REED

EXHIBIT 10

Renton City Council

4/6/81 Page 5

Correspondence and Current Business—Continued

* * * *

Planning and Development Committee Adult Entertainment Land Use

Planning and Development Committee Chairman Rockhill presented committee report which recommended that Council concur that it is in the best interest of the City and is the desire of its citizens to provide regulation for the so-called adult motion picture theater location. Also recommended: that the ordinance be written to reflect the following desired conditions: (a) No adult motion picture theater be allowed in any area used or zoned residential of P-1 public use area; (b) A buffer strip of 1000 feet from any residential or P-1 area also be a banned area; (c) The area enclosed in a one mile radius of any school also be banned area (minimum student walking area). The report recommended Council concurrence and referral to the *Ways and Means Committee* for ordinance. MOVED BY CLYMER, SECOND ROCKHILL, CONCUR IN REPORT. CARRIED.

* * * *

EXHIBIT 11

Renton City Council

4/13/81 Page

Old Business Continued—

Public Safety Committee—Continued

* * * *

Ordinance #3526 Adult Motion Picture Theater Zoning

The committee report recommended second and final readings of an ordinance relating to land use and zoning for adult motion picture theaters. Following reading, MOVED BY HUGHES, SECOND ROCKHILL, ADOPT THE ORDINANCE AS READ. ROLL CALL: 5-AYE: AYES: STREDICKE, REED, TRIMM, HUGHES, ROCKHILL; ONE NO: SHANE. CARRIED.

* * * *

EXHIBIT 12

CITY OF RENTON, WASHINGTON

ORDINANCE NO. 3526

AN ORDINANCE OF THE CITY OF RENTON, WASHINGTON, RELATING TO LAND USE AND ZONING.

THE CITY COUNCIL OF THE CITY OF RENTON, WASHINGTON, DO ORDAIN AS FOLLOWS:

SECTION I: Existing Section 4-702 of Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" is hereby amended by adding the following subsections:

1. "*Adult Motion Picture Theater*": An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specific sexual activities" or "specified anatomical areas" as hereafter defined for observation by patrons therein.

2. "*Specified Sexual Activities*":

- (a) Human genitals in a state of sexual stimulation or arousal;
- (b) Acts of human masturbation, sexual intercourse or sodomy;
- (c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. "*Specified Anatomical Areas*"

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and

female breast below a point immediately above the top of the areola; and

- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SECTION II: There is hereby added a new Chapter to Title IV (Building Regulations) of Ordinance No. 1628 entitled "Code of General Ordinances of the City of Renton" relating to adult motion picture theaters as follows:

A. Adult motion picture theaters are prohibited within the area circumscribed by a circle which has a radius consisting of the following distances from the following specified uses or zones:

- 1. Within or within one thousand (1000') feet of any residential zone (SR-1, SR-2, R-1, S-1, R-2, R-3, R-4 or T) or any single family or multiple family residential use.
- 2. One (1) mile of any public or private school.
- 3. One thousand (1000') feet of any church or other religious facility or institution.
- 4. One thousand (1000') feet of any public park or P-1 zone.

B. The distances provided in this section shall be measured by following a straight line, without regard to intervening buildings, from the nearest point of the property parcel upon which the proposed use is to be located, to the nearest point of the parcel of property or the land use district boundary line from which the proposed land use is to be separated.

SECTION III: This Ordinance shall be effective upon its passage, approval and thirty days after its publication.

PASSED BY THE CITY COUNCIL this 13th day of
April , 1981.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 13th day of April
, 1981.

/s/ Barbara Y. Shimpoch
BARRARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

Date of Publication: May 15, 1981

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-59M

PLAYTIME THEATRES, INC., a Washington corporation,

and

KUKIO BAY PROPERTIES, INC., a Washington corporation,
Plaintiffs,

vs.

THE CITY OF RENTON, *et al.,*
Defendants.

[Filed Feb. 10, 1982]

Testimony of David R. Clemens on January 29, 1982,
before the Honorable Philip K. Sweigert, United States
Magistrate.

[3]

APPEARANCES:

For the Plaintiffs:

HUBBARD, BURNS & MEYER

By Jack R. Burns

Attorney at Law

10604 N.E. 38th Place

Suite 105

Kirkland, Washington 98033

and, of Counsel

Robert Eugene Smith

Attorney at Law

For the Defendants:

WARREN & KELLOGG, P.S.

By Lawrence J. Warren and

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and

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I.D. ADM.

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[4] DAVID R. CLEMENS,
called as a witness on behalf of the Plaintiffs, having
been duly sworn, was examined and testified as follows:
THE CLERK: Would you state your full name and
spell your last name for the record, please.
THE WITNESS: David R. Clemens, C-L-E-M-E-N-S.

DIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Clemens, would you tell the Court what your
present occupation is?

A. I'm the policy development director for the City of
Renton.

Q. Would you tell us what that means, sir?

A. The policy development director is responsible for
comprehensive planning for the City of Renton, which
would include land use, utilities, other aspects.

Q. What position did you hold in May of 1981?

A. I was the acting planning director for the City of
Renton.

Q. Is there still a planning director presently?

A. No, there is not.

Q. All right. Now, you made an affidavit, did you
not, sir, in connection with the response to the lawsuit
[5] before the Court?

A. Yes, I did.

Q. Do you have a copy of your affidavit with you?

A. Not in my hands, no, sir.

MR. SMITH: May I approach the witness, your
Honor?

THE COURT: Yes.

MR. SMITH: Thank you.

THE COURT: If you hand it to the Clerk, the Clerk
will provide it to him.

(Document handed to the witness.)

Q. (By Mr. Smith) Would you look through that
document and tell me whether or not you recognize the
same? Would you look through that?

A. Yes, I do.

Q. Now, do you see at Line 4 where you discussed the
possibility of how many acres are available for an adult
use to locate?

A. Yes, I do.

Q. What do you say generally about that? What do
you talk about? How many acres are available?

A. The affidavit indicates that there are approxi-
mately 400 acres that comply with the ordinance.

Q. How many parcels of land, sir?

[6] A. Does it not state.

Q. Did you designate that on the map that's attached
to that affidavit?

A. Yes, I did.

Q. Who did the designation on that map?

A. My office.

Q. All right, sir. Now, taking the designation that
you have on your map, would you turn to the map that
you have there, please? The top item, the top location for
an adult use, do you know where that is specifically, sir?

A. Yes, I do.

Q. Where is it?

A. It's located within the Boeing Industrial Complex.

Q. Is there a security gate that makes it necessary to
go through there to—

THE COURT: Counsel, may I ask that if you're
going to ask him to refer a particular area, refer to it
more explicitly than the top. Two of them look awful
close and I'm not at all sure of which one you're talking
about. So for the purpose of the record, let's make it as
clear as possible.

MR. SMITH: Your Honor, we'd like to have the zon-
ing map of Renton, Washington, indicating an effective
date of June, 1981, entered in evidence as [7] Plaintiffs'
Exhibit 1.

The COURT: Will you have it marked?

THE CLERK: It will be marked as Plaintiffs' Exhibit No. 1.

(Plaintiffs' Exhibit No. 1 marked for identification.)

Q. (By Mr. Smith) All right, sir. Now, you have a smaller map which is attached to your affidavit; isn't that correct?

A. Yes, there is.

Q. All right. Now, sir, would you show us on the Exhibit 1 where the area is that you said refers to as Boeing?

A. The parcel in question would be located almost central on that map.

Q. Would you just point to it?

A. Yes, I will.

Q. Is it fair to say the area that I'm pointing to? Do you adopt that?

A. That's correct.

MR. SMITH: Counsel?

THE COURT: Mark it or something so that we know what he's referring to.

MR. WARREN: Your Honor, maybe for the ease of the Court, Mr. Clemens has a larger-size map [8] which he himself prepared for court today after we heard that he had been subpoenaed. That would be his actual work product rather than relying on that map that somebody else—

THE COURT: Is it the same type of map?

MR. WARREN: It is just about the same size, I believe.

THE COURT: Why don't you let counsel see it and perhaps that should be the exhibit presented to the Court.

(Brief pause.)

MR. SMITH: It appears to be the same and I would ask the withdrawal of that which has been marked as

Exhibit 1 and use that, with the permission of the Court, that has been prepared by the witness.

THE COURT: Whether it's admitted as Plaintiffs' or Defendants' doesn't seem to matter. Go ahead and mark it as Plaintiffs' exhibit or a Defendants' exhibit. I don't care which it is.

THE CLERK: This will be marked as Plaintiffs' Exhibit 1.

MR. WARREN: If it will help, your Honor, I'll provide my copy.

Q. (By Mr. Smith) Mr. Clemens, you have designated on this zoning map which is marked as Plaintiffs' Exhibit [9] 1, area A, and there is a green area with red ink on the outside. Is the green area one of the areas that you indicated was available for location of adult theatre use?

A. That's correct.

Q. Now, you indicated that you're personally familiar with that area?

A. Yes, I am.

Q. And that, I believe you testified, was the Boeing Company?

A. That's correct.

Q. Do you know what is located in that very area?

A. The Boeing-Renton Manufacturing Complex.

Q. Is there a security gate that keeps people from coming and going in there, sir?

A. Yes.

Q. So this area that you talked about is already being used by the Boeing Company and there is a security gate that people have to pass through to get in; is that correct?

A. That's correct.

Q. Now, the next area you've designated is area B?

A. B.

Q. And area B is a place that is indicated on the corner of the map, and underneath it is written the word [10] "disposal." Would you tell the Court what is located at the area that's marked in green, area B?

A. There are, I believe, three uses in that general area. First is the Renton Metro Sewer Treatment Plant. Second is a vacant property. The third is a partially-abandoned railroad right-of-way.

Q. Now, how broad is the area? How many acres are located on area B?

A. I have no idea, sir.

Q. How much of it is part of the disposal area?

A. A substantial portion of it.

Q. Three-quarters of it?

A. Possibly.

Q. Or it may even be more; isn't that correct?

A. Possibly.

Q. Now, taking the area that you designated as area C, would you tell us what's located there?

A. There are no uses at that site at this time.

Q. Ever heard of Koll Office & Shopping Center Developers?

A. Yes, I have.

Q. Do you know they are developing that whole area there?

A. Yes, I do.

Q. Well, then, there is a use that's being put to that, isn't there? Aren't there signs up that way, "For Sale" and "For Rent" and construction laid out in that [11] area?

A. Not to the best of my knowledge, not at that location.

Q. When was the last time that you looked at that location, sir?

A. It's been several weeks.

Q. Where is it that Koll is located in that area, if you know?

A. The applications currently pending before the City of Renton are north of that site.

Q. North of that site? Do you know how much the acreage is on that one site there?

A. Not precisely, no, I don't.

Q. Is there a flood plain located in that area?

A. In that general vicinity, yes, there is.

Q. Isn't there a requirement that someone who builds there sign a waiver releasing the City of any liability?

A. That is correct.

Q. So that at any time, it could flood and any existing building there would have to bear the responsibility or the owner would have to bear the responsibility for the damage, the City could not be called upon; is that correct?

MR. WARREN: I'm going to object. That asks for legal conclusion from the planning director [12] that I don't think he's competent to make.

THE COURT: Overruled.

THE WITNESS: There is a requirement for a waiver to be signed for any use, regardless of the type of use.

Q. (By Mr. Smith) There was at one time a moratorium, was there not, until probably the last nine months on new building in that area?

MR. WARREN: I object, your Honor. It's irrelevant. If there was a moratorium at one time, it doesn't bear on the case now.

THE COURT: Overruled.

Q. (By Mr. Smith) If you know, sir?

A. I believe that there was a moratorium. I'm not certain that that property in particular was affected.

Q. Do you know when the flood plain plan was adopted by the City?

A. I believe that it was adopted in the spring of 1981.

MR. SMITH: I'd like to have this marked as Exhibit 2, please, Plaintiffs' Exhibit 2. This is the ordinance for the adoption of the flood plain and the waiver form.

THE CLERK: It will be marked as Exhibit 2.

(Plaintiffs' Exhibit No. 2 was marked for identification.)

[13] THE COURT: It's already in the record, isn't it? Is this the ordinance itself?

MR. SMITH: Yes. I'm showing the date, your Honor. The hearing was October of '81. It does conflict with spring. I'm just trying to have all the facts in there. This is the flood plain ordinance.

THE COURT: Excuse me.

MR. SMITH: And the waiver form, your Honor, that has to be signed.

(Document handed to the witness.)

MR. WARREN: Your Honor, I don't wish to keep objecting, only I don't understand where we're going with this. Because the Court said that he would be permitted to have live testimony of Mr. Clemens with respect to his affidavit. His affidavit doesn't mention flood plains. It doesn't mention the uses to which individual parcels would be put.

THE COURT: His affidavit says there are 400 acres available for the use that would be permitted by this ordinance, that would permit an adult theatre to operate.

MR. WARREN: That's correct.

THE COURT: All right. I think that this [14] examination and this testimony is relevant to that conclusion.

MR. WARREN: Thank you, your Honor.

THE WITNESS: I'm familiar with this document.

Q. (By Mr. Smith) Would you indicate—you said earlier you thought it was the spring of '81?

A. There are two sets of regulations which would apply. And I believe correctly the City's flood hazard regulations were adopted in May of 1981. This is a separate requirement of the City that was adopted at a later date.

Q. And that is the requirement for the signing of the, the execution of the waiver?

A. Yes. According to Section 2, that's correct.

Q. Would that apply to the area covered by that which you designed here as area C?

A. Yes, it would.

Q. Now, taking area D you have designated here, would you tell us where that's located?

A. It is generally located in the vicinity of the Longacres Racetrack.

Q. When you say generally in the vicinity, isn't it in the middle of the Longacres Racetrack?

A. Yes. Much of it is.

[15] Q. Well, how much of it is not in the contiguous area of Longacres Racetrack?

A. I believe about a third of it would be outside of the racetrack area itself.

Q. When was the last time you checked?

A. I reviewed the air photograph of that area this morning.

Q. All right. Is there parking around the racetrack?

A. Yes, there is.

MR. SMITH: With the Court's permission, may the witness show us where the parking would occur around the racetrack?

THE COURT: He may.

THE WITNESS: Your Honor, the racetrack is illustrated within this drawing. There is parking on the north, on the west and in areas in the south.

Q. (By Mr. Smith) So are you saying that the area that's marked G here is part of the racetrack parking area?

THE COURT: I thought we were talking about D. He marked it as D.

MR. SMITH: Your Honor, I'm talking about where it has G printed on the map.

THE COURT: Well, let's not confuse the record, Counsel. He's made a mark that is his mark and marked that, I believe, as—did you mark it as [16] area D?

THE WITNESS: That's correct.

THE COURT: Let's talk about it as area D. Otherwise, nobody's going to understand what's going on.

Q. (By Mr. Smith) Now, in the area south of the racetrack or at least below the racetrack, there is seemingly an open area. Isn't that in fact parking for the racetrack?

A. It is utilized as parking at some times.

Q. For the racetrack?

A. Yes.

Q. Is it owned by the racetrack people?

A. I do not know for sure.

Q. You didn't check that before you came in?

A. No, sir, I did not.

Q. Is any of that developed other than for parking for the racetrack?

A. Ao, not to the best of my knowledge.

Q. Now taking the area that you have designated as area E, could you tell the Court what's located in the area marked area E?

A. There are two industrial uses or groups of industrial uses, one located generally in this vicinity and one located west of the railroad tracks [17] which were illustrated here.

Q. All right. And one of them is the Benearoya Industrial Park; is that correct?

A. That's correct.

Q. And how much of that area that's reflected here, do you know how many acres this would be, the area E?

A. No sir. Not precisely. I could guess that it's probably in excess of 100 acres.

Q. Now, is there a drainage ditch in there that is designated as a possible nature trail on your comprehensive planning?

A. The comprehensive plan identifies the Springbrook Creek as a green belt.

Q. Would you point that out, please, where that would be?

A. Approximately in this area.

Q. Now, you're indicating an area that cuts across and bisects the bottom right-hand side. Now, under your ordinance, as you understand it to be, wouldn't the green belt area be considered a park?

A. It is not currently existing.

Q. No. But it is designated that's where you're putting it; is that not correct, sir?

A. At the present time, the City has no plans for development of that area for park purposes.

[18] Q. All right. Is that flood plain area, also?

A. It's all within the disclaimer area.

Q. So that means that someone would have to sign and agree that they would not sue the City, so to speak, for damages as a result of the flood plain?

A. That's correct.

Q. Now, is there a school immediately outside of the limits which would be within one mile of that area?

A. There is a school which is currently vacant and boarded up within that vicinity, that is correct.

Q. And that school is located where?

A. Approximately at this location.

Q. Where would one mile from there be in terms of this area?

A. Would cover the majority of that area.

Q. Cover the majority of that area? And the flood plain would cover the entire area, would it not?

A. Yes, it does.

Q. But yet there are two areas that are business parks being developed; is that correct?

A. They are existing.

Q. Yes. And are they in the flood plain?

A. Yes, they are.

Q. They preexisted the flood plain ordinance?

A. That is correct.

[19] MR. SMITH: Excuse me, your Honor.

(Brief pause.)

MR. SMITH: Your Honor, I would like to mark for identification the Renton Urban Area Comprehensive Plan, revised as of January, 1980, which would show the green belt area running through that part of the map which indicates area E.

THE COURT: Would you have it marked?

THE CLERK: It is marked as Plaintiffs' Exhibit No. 3.

(Plaintiffs' Exhibit No. 3 marked for identification.)

MR. SMITH: And I have, your Honor, asked as the next exhibit to be marked is the area service by the notice of disclaimer for flood damage, which encompasses the area marked, designated D and the area that's designated E and the area designated C.

THE CLERK: It is marked as Plaintiffs' Exhibit No. 4.

(Plaintiffs' Exhibit No. 4 marked for identification.)

THE COURT: I don't believe that you've moved the admission of any of these yet.

MR. SMITH: No, sir, I haven't.

[20] THE COURT: Gentlemen?

(Document shown to counsel.)

MR. SMITH: I'd like to have this marked as the next exhibit, please.

THE CLERK: Exhibit No. 5, it is marked.

(Plaintiffs' Exhibit No. 5 marked for identification.)

Q. (By Mr. Smith) Mr. Clemens, can you see this map?

A. Yes, I can.

Q. Do you see the area where the racetrack is located?

A. Yes, I do.

Q. Does this refresh your recollection about where the parking facilities are paved?

A. Yes.

Q. What area near the racetrack would be usable in the area D for an adult theatre?

A. If you will note from my affidavit, I state that there are areas where the regulations do not apply. That is the only statement that I made.

Q. Well, what areas are there that the regulations do not apply?

A. The areas in green.

Q. Is there any area in area D that is not encompassed by the parking lot where adult use could be placed?

A. The unpaved parking area that's south of the line of [21] trees, which you can see on this photograph.

Q. Are you talking about the area over here?

A. No, sir. South of the line of trees.

Q. Talking about right along here?

A. It might be easier—

Q. If you would put a mark on there, please, sir?

THE COURT: First of all, I'm not sure anybody's really identified that and indicated what it is and what it depicts and whether they are familiar with it.

MR. SMITH: I will.

Q. Mr. Clemens, do you recognize the topography of the areas that's presented by this map?

A. Yes, I do.

Q. Have you ever seen a map like this before?

A. Similar to that.

Q. And you're familiar with the terrain and what exists in and around the community of Renton sufficiently to acquaint yourself with this being an accurate depiction thereof?

A. Yes.

Q. And the area that you have designated is south of the track as an area where adult theatre use could be placed; is that correct?

A. It is an area where the adult theatre limitation [22] regulations would not apply.

Q. Would not apply? Now, is there a railroad track abutting that particular area?

A. Yes. To the west.

Q. When you say to the west, isn't that south of the area you've designated?

A. No. You're holding the photograph 90 degrees off is the problem.

Q. Is this more correct

A. No. It's upside down now.

Q. Now, the area that you designated as the place where an adult use theatre could be located is right there; is that correct?

A. No, sir.

Q. Talking about down here?

A. That's correct.

Q. Where is the railroad track located?

A. To the west.

Q. Where is there a road leading into here, a paved road?

A. Both on the west underneath the railroad tracks and from the north off of Southwest 16th Street.

Q. Now, the area that is indicated for the ultimate green belt is located where, sir?

A. The area designated as a green belt would follow the [23] Springbrook Creek in its current alignment or at such time as the ultimate drainage facilities of the valley are constructed. The green belt would follow wherever those facilities went.

Q. So that with the master plan of the green belt set forth in your comprehensive master plan, then, this would in essence be a park at the time that finally occurred; is that not correct?

A. No, sir. I have no knowledge that that would be the case. The City of Renton does not own the right-of-way at the present time, has no plans to construct any park or recreational facilities.

Q. Now, in the area that's been designated as area E on your map, are there railroad tracks through there?

A. Yes, sir, there are.

Q. Do they have access crossing the railroad tracks at that particular area?

A. There are a number of railroad tracks, some of them are crossed and others are not.

Q. Down at the bottom in the area where I'm pointing appears to be railroad tracks; is that correct?

A. That is correct.

Q. How many different tracks would you say are along there?

[24] A. That's not in the City of Renton.

Q. That's not in the City of Renton?

A. No, sir, it's not.

Q. So immediately above that, the railroad tracks are in the City of Renton?

A. No, sir, they are not.

Q. None of those are in the City of Renton?

A. Not till you get to Southwest 43rd, and you did not point to that area.

Q. I understand. Is there an access across these railroad tracks into the backway of this area that you've designated as E?

A. If you're speaking about area E, it's not the area that you were pointing to on the aerial photograph.

Q. Area D; is that correct?

A. Pardon me?

Q. Is that area D?

A. No, sir, it's not.

Q. All right.

May I have a moment, your Honor?

(Brief pause.)

Q. (By Mr. Smith) Sir, on this map, in this area that I'm pointing to, which area is that on the map over here that we have?

A. It would be just to the east of area E.

[25] Q. Would it be inclusive of area E, any part of it?

A. The very fringe.

Q. Aren't there two cul de sacs that very recently have been placed in there?

A. That is correct.

Q. And railroad track spurs that have gone across there?

A. Yes, there are.

Q. And that's in area E?

A. That's correct.

THE COURT: Is it or isn't it in area E? It is in area E what he's just pointed to? I thought I heard you say that it was outside area E. It is part of area E?

THE WITNESS: The area which you just pointed to is within area E and there were cul de sacs.

Q. (By Mr. Smith) New cul de sacs placed?

A. That's correct.

Q. And railroad track spurs; is that correct?

A. That is correct.

Q. Do you, sir, know whether any minutes were kept of any meetings by the City of Renton governmental officials on the so-called adverse effects of an adult entertainment land use?

A. By minutes, do you mean notes that were made by either our office or the City Attorney's Office or [26] are you speaking of formal minutes?

Q. Public record by the Secretary of the Council, the City Council or such?

A. Not to the best of my knowledge.

Q. You've said several times in your affidavit, you've used the term "adverse effect of adult theatre uses." What is it you meant by the adverse effect of adult theatre uses that the City considered?

A. The effects that were discussed by the people that spoke were generally construed, the comment was consistent throughout most of the testimony that there was a grave concern about the effects of this type of activity upon persons or individuals in the general vicinity of those uses.

Q. What were the adverse effects that were discussed?

A. I cannot state it any different than I have just stated it, sir.

Q. Well, was there a differentiation between adverse effects of adult theatre uses and adverse effects of adult bookstore uses?

A. I believe that the majority of the speakers spoke to both issues in essentially the same light.

Q. What evidence, if any, was taken from any planners or real estate people as to how the adult theatre use would affect the economic health of the City?

[27] A. * The fire department reviewed documents from the City of Seattle which had recently passed a legislation dealing with this type of activity and the committee of the Council was made aware of the discussions that were presented in the City of Seattle.

Q. Was there any testimony by any professional as to the economic adverse effects of the adult theatre use in the City of Renton?

A. Yes, sir. By the Chamber of Commerce President.

Q. Whose name was that?

A. Kay Johnson.

Q. And Kay Johnson is what kind of professional?

A. I don't know what his professional background is. He is the manager of the City—of the Greater Renton Chamber of Commerce.

Q. Is he a real estate broker?

A. I do not know, sir.

Q. Was there any analysis of land values, property values?

A. None that was done by our office.

Q. Well, what by your office other than getting what Seattle may have done, what evidence did you gather and present on the question of the adverse use effect on the economic health of the citizens?

A. The statement of the citizens of the City of Renton [28] as a part of the public meeting on this subject.

* Counsel for both parties agree that the words "The fire" should read "Our."

Q. And that's the extent of it?

A. Yes, sir.

Q. Now, how about the adverse effect on the business welfare of the citizens? What professional testimony did you present or gather to support that conclusion?

A. One of the statements of the citizens who spoke at the public meeting.

Q. Who were opposed to an adult theatre; is that correct?

A. I can't speak to that specifically.

Q. You were there, weren't you?

A. Yes, I was.

Q. Did they talk about adult theatre uses?

A. Yes, they did.

Q. They talked about the use of the theatre because of the content of the material; isn't that true?

A. I'm not sure that I can speak specifically to that.

Q. Well, was it somebody from the school, some one of the principals of the school that came in and talked about children having to be exposed to adult theatres if they walked within a mile of the school?

A. Yes. The superintendent of the schools spoke to that issue.

Q. Now, he was talking about the content of the material [29] offered by the theatres?

A. I don't know what was in his mind when he was making his statement.

Q. All right. Now, how about the vitality? What evidence did you present and gather to the City Council as to protecting the vitality of the City of Renton from the adverse effects of adult theatre uses?

A. The testimony of the citizens of Renton at the public meeting.

Q. Any professional testimony of any experts?

A. None that I recall.

Q. All right. Now, what is it that you meant by the word "vitality"?

A. Economic health, I believe.

Q. But you talked about economic health and you talked about vitality and welfare as though they are separate categories. Are you saying now they are but one category?

A. If you could refresh my memory as to where that's located?

Q. On Page 6, sir, Line 27.

A. I believe all three times vitality, economic health and business welfare all speak to the same general issue of economic acceptability.

Q. So the justification is the economic health of the [30] City of Renton?

MR. WARREN: Objection, your Honor. Whose justification for what are we talking about? Is he asking him to speculate as to what the City Council did?

MR. SMITH: The justification set forth in his affidavit.

THE COURT: In his affidavit. He's asking him what he means by the words he used. I think that's certainly proper.

THE WITNESS: The two issues that I recall that the Council was concerned about was the economic health of the businesses within the City of Renton and concerns about the protection of residential neighborhoods of the City of Renton from potential adverse effects of adult entertainment.

Q (By Mr. Smith) What are the potential adverse effects of adult entertainment that you presented and had considered at the meeting?

A. The discussion—if I might?

Q. Yes, sir.

(Brief pause.)

A. The testimony presented to the committee, as noted on Page 3, beginning about Line 27, testimony presented to the committee consistently noted adverse impact [31] upon neighborhoods and businesses within the City of Renton from those types—types of activities that would include adult theatres.

Q. As of that day—that was in March of 1981, correct?

A. That is correct.

Q. Was there an adult theatre in the City of Renton?

A. Not to the best of my knowledge, sir.

Q. Then what evidence did you present from professionals as to what the adverse impact was on neighborhoods and businesses from adult theatre use?

A. Other than our analysis of other jurisdictions' findings and conclusions, there was none.

Q. Now, you analyzed Seattle; is that correct?

A. That's correct.

Q. How many months of hearings did they have in Seattle, if you know?

A. I don't know, but it was extensive.

Q. Did you review all of that or have your staff review all of that?

A. We reviewed the major conclusions and not the detailed background.

Q. So you reviewed the conclusions, but you did not review the factual basis on which the conclusions were based; is that what you're saying?

A. I'm not sure that I fully understand the question.

[32] Q. Well, you said you didn't review the whole thing, you reviewed the conclusions, correct?

A. That is correct.

Q. By that do you mean the summary of what they found to be and their recommendations?

A. That is correct.

Q. Did you read the facts upon which they based their summary?

A. Not every fact, no, sir.

Q. Did you read any of the facts or did you just read the conclusions?

A. We read the summary of their findings and conclusions.

Q. The summary of their findings and conclusions?

A. That's correct.

Q. Did you go back to the original source documents to see what the adverse impact, if any, would be?

A. No, sir, we did not.

Q. Then how were you able to give that information to the City Council of Renton of what the factual basis was?

A. We could only give them what we reviewed, and that was a summary of the findings of the City of Seattle and their conclusions.

Q. What other geographic area besides Seattle? You [33] said there were other jurisdictions whose studies that you reviewed. What other ones?

A. We reviewed the Court's findings in the case of Young versus the City of Detroit. I believe that's the case.

Q. What other findings did you review from other geographical areas?

A. No findings.

Q. None?

A. None.

Q. Now, you indicated on Page 3 at Lines 8 through 10, you talked about the fact that, "The Council consider comments from the land use planning professionals in my office . . ." do you see that part there, sir?

A. Yes.

Q. What comments were made—I mean, what land use planning professionals in your office made comments?

A. Myself.

Q. So when you phrased this, you mean you're the one that made the comments?

A. That's correct.

Q. And you looked at the summary of the conclusions in the City of Seattle and Young versus American Mini Theaters; is that correct?

[34] A. Correct.

Q. And so you were the land use planning professional that made the comment to the Council?

A. That's correct.

Q. Anybody else who was a professional make a comment on that aspect of land use planning?

A. None that were land use professionals.

Q. All right. So as the land use planning professional who reviewed the summary of the City of Seattle, what are the adverse impacts that you identified and presented to the City Council in your position as acting planning director?

A. The areas of concern that were drawn from the City of Seattle was the potential for adverse effects upon the moral character of young people within the area, that there was the potential for secondary impact of other related both potential criminal activity and activities of that type, and the potential adverse impact on property values in the immediate vicinity of those types of uses.

Q. The City of Seattle has a Skid Row area, does it not?

A. Yes. I believe that's—

Q. And the adult use zoning area is primarily within that Skid Row district, is it not?

[35] A. It is now.

Q. Yes. I'm saying it is now, correct?

A. Correct.

Q. And the bars and other Skid Row appurtenances are already there, are they not?

A. Yes, sir. If I might?

Q. Yes.

A. The discussion related to eliminating adult entertainment uses from areas outside of that area and the potential spinoff effects that would be similar to the Skid Row impacts if those uses were allowed to remain outside of that area.

Q. All right. Now, what are the collateral criminal activities that you indicate could occur by having an adult theatre?

A. Prostitution.

Q. What else?

A. Potentially assault, activities of that type.

Q. Prostitution could be punished as a crime, can it not?

A. Yes, it can.

Q. Can assault be punished as a crime?

A. Yes, it can.

Q. Were there any other facts other than protecting, I think you said, the moral fiber of young people? Is that what you said?

[36] A. Yes.

Q. And the depreciation in real property values?

A. Yes.

Q. And you have no independent factual evidence, do you, sir?

A. No, sir.

Q. Of what that impact would be, do you?

A. No, sir.

Q. Was there not an equal concern on your part as the City Planning Director commenting to the City Council that adult bookstores, peepshow operations could have the same impact?

A. I believe the regulations speak only to motion picture theatres and those, I believe, by definition in the Code would include a peepshow type of activity. Does not include adult bookstores.

Q. Is there any difference as you perceived it from your review of the summary of conclusions between the—strike that. Did you not study and would you look at Page 5, Line 27 and 28 of your affidavit? Did you not have a study of the location of adult entertainment land uses as a whole?

A. Yes. All were discussed.

Q. What was the reason, if you know, in your recommendations that nothing was done about adult [37] bookstores and adult theatres were singled out?

A. I do not recall at this time why it was segregated to just that one activity.

Q. Is the zoning predicated on the content of the material being offered?

A. I would presume that that is correct, based upon the definition.

MR. SMITH: Thank you, no further questions.

Your Honor, if I may at this time, I would move into evidence all of the exhibits which have previously been identified and marked as Plaintiffs' Exhibits 1 through 5 inclusive.

MR. WARREN: I have no objection, your Honor, except I don't think 4 and 5 have been identified.

THE COURT: I don't believe the photograph has been identified certainly. Which one is that?

THE CLERK: 4.

MR. SMITH: I think that was identified, your Honor.

THE COURT: Is that 4 or 5?

THE CLERK: It's 5.

MR. WARREN: I understood that to be 3, your Honor.

[38] THE COURT: Let's review what they are. This is 1. That will be admitted. 1 is going to be admitted. What was 2?

MR. WARREN: 2 was the ordinance on the flood plain, I believe.

THE COURT: Any objection to 2?

MR. WARREN: No.

THE COURT: 2 will be admitted. 3 is the comprehensive plan.

MR. WARREN: I don't think that was identified, but we have no objection to the document.

THE COURT: It was. 3 will be admitted. 4 is?

MR. SMITH: The flood plain, your Honor.

THE COURT: Yes. That was identified by the witness. Do you have any objection?

MR. WARREN: Okay.

THE COURT: 4 will be admitted. 5 is the photograph. Do you have an objection to that?

MR. WARREN: No, your Honor.

THE COURT: 5 will be admitted.

(Plaintiffs' Exhibits 1 through 5, inclusive, were admitted.)

MR. SMITH: Thank you, your Honor.

[39] CROSS-EXAMINATION

BY MR. WARREN:

Q. Mr. Clemens, could you focus in, please, on the flood plain ordinance and the exhibit dealing with the area to be covered by the flood plain moratorium? Initially, does the ordinance in any fashion bar development within the flood plain area?

A. No, sir, it does not.

Q. Can you relate to the Court the background that led up to the adoption by the City Council of that flood plain disclaimer ordinance and the area?

A. The Federal Emergency Management Administration is charged with the requirement by Federal statute to develop flood plain areas for flood insurance purposes. Their study was completed in the spring of 1981, I believe, or it could have been late fall of 1980. I'm not precisely sure of the date. Approximately midsummer of 1981, the City was made aware of the potential for some very erroneous conclusions that that study drew. After a discussion with the Federal Emergency Management Agency and their consultants, it was concluded that the findings of the initial study were incorrect and that the potential for flood hazard within the entire valley area was—the possibility was there [40] for substantially greater flood hazard than had been identified in the original documentation.

Q. To date, has the City or the Federal government developed exact figures as to where the flood hazard line should be located?

A. No, sir. Those are still under preparation by consultants for the FEMA people.

Q. Now, if I could, Mr. Clemens, pointing to the large map, which I think will be easier to refer to, is it

not true that the general area of the flood plain covers all of this area?

A. That's correct.

Q. Okay. And are there existing commercial developments in that area?

A. Yes, there are.

Q. Are there many?

A. Both at the north and south, there are extensive commercial developments.

Q. Could you describe to the Court the type of development that's in the Benaroya area?

A. There are industrial buildings covering approximately three million square feet of gross floor area. West of the Benaroya development along the West Valley Road, which would be the western perimeter of the area marked in black on Exhibit No. 1, are [41] various types of industrial uses. Going north, as already has been spoken to, is the Longacres Horseracing Track, and its accessory uses, which includes restaurants and other types of activities. Along both the northside and southside of Interstate 405, which extends east and west between areas B and C and the area D, which would be below it, are a variety of industrial and commercial activities ranging in size from relatively small to up to 200,000 square feet of gross floor area.

Q. Mr. Clemens, to the best of your knowledge, are the areas that are developed presently occupied by the owners or tenants thereon?

A. Yes, sir. Most of them are. There may be some vacancies, but the majority are occupied.

Q. Do you know whether the Benaroya complex is fully rented?

A. I don't know specifically. But I would believe that it's fully occupied.

Q. Now, Mr. Clemens, is there anything in the ordinance, this particular ordinance that's being challenged, or any City ordinances that would ban an adult entertainment theatre from occupancy in the Benaroya Park?

A. None that I'm aware of, sir.

[42] Q. How about in any of the other developments that are included in the green areas on your map? Is there anything that you know of in our ordinances that would ban the use or occupancy of one of those areas?

A. No, sir. I'm not aware of any.

Q. Mr. Clemens, this notice of disclaimer that has been admitted, the map, is the intent, to the best of your knowledge, that this be a permanent document?

A. No, sir, it is not. The intent of that document is to act as an interim regulation until such time as the revised FEMA analysis of the flood hazard has been developed, at which time the disclaimer would no longer be applicable and the City's flood hazard regulations established in the early part of 1981 would apply.

Q. Now, focusing in again on the discussion that was in area—

THE COURT: May I ask a question?

MR. WARREN: Excuse me, yes.

THE COURT: Mr. Clemens, the flood plain area that you were talking about that's been identified, does that include both D and E?

THE WITNESS: Yes, sir, it does.

THE COURT: Does it include B and C, also? [43] Does it go that far?

THE WITNESS: It does include C. I believe area B is not included because it is higher than the surrounding areas.

THE COURT: But the other areas would all be included in that?

THE WITNESS: With the exception of A.

THE COURT: With the exception of A, yes. All right.

Q. (By Mr. Warren) Mr. Clemens, is it possible for someone to come into the City, one of those areas that's included and fill the property?

A. Yes, it is.

Q. And possibly take it outside of the floodway fringe?

A. Yes, sir, it is.

Q. Directing your attention to the area that's been marked area E, and there was some discussion previously about cul de sac roads in this area. Are these or recent origin?

A. Yes, sir, they are.

Q. Why were the cul de sac roads put in here, to the best of your knowledge?

A. To provide for further development of that area for various kinds of industrial and commercial uses.

Q. So these are access roads, then, to the site; is that [44] right?

A. That is correct.

Q. How about the railroad spurs that are in this location? Are they of recent origin?

A. Yes, sir, they are.

Q. Are they capable of being crossed?

A. At the present time, some of them cannot. There are platted streets which extend beyond all of those railroad spurs, which when the roads are completed would be available to access across the railroad tracks.

Q. If someone desired to develop a property, they could then bring a road to the grade of the railroad spurs?

A. That is correct.

THE COURT: A followup on my question with respect to the areas included in the flood plain, the areas that are not marked in green on the map, areas C, D and E. There are substantial areas just outside of those that are also included in the flood plain?

THE WITNESS: Yes, sir.

THE COURT: That are developed with the commercial and industrial uses?

THE WITNESS: Can I illustrate that, your [45] Honor?

THE COURT: Yes.

THE WITNESS: Speaking to Exhibit No. 5, if I might place this in close proximity. This is the Interstate 405 Freeway and that is located at this location on the other map. This is the Valley Freeway and, again, that's located here on this map. So you have some feel for the general location.

The Longacres Racetrack is here. It sits here approximately on this photograph. The areas at the south end of our City Limits—

THE COURT: Well, I can see. What is that? That's the big interchange up there and that's the areas that's on the map there.

THE WITNESS: Right, that's correct. If you will refresh me with the question again?

THE COURT: I was curious to know of areas within that same flood plain, outside of the areas that we've talked about, specifically that would permit the use that we're talking about here that are presently commercially and/or industrially developed.

THE WITNESS: That are developed and within the flood plain?

THE COURT: Yes.

THE WITNESS: And within—

[46] THE COURT: No. Not within the area that we're talking about. Most of that, I think, we've talked about that already. But I'm just interested in knowing of the development that is presently there that's there in spite of the fact that it's in a flood plain.

THE WITNESS: Okay. The largest, of course, is the Benaroya Complex here at the extreme south.

THE COURT: Well, now, that was within our area, is it not?

THE WITNESS: That's correct. Adjacent to that is the Koll Business Park located in the vicinity.

THE COURT: But that's in our vicinity, is it not?

THE WITNESS: It's not within—portions of it may fall within it.

THE COURT: It's partially in and partially out is what you're saying?

THE WITNESS: Right. There are warehouses in this general area, as you can see from the photographs. A tank farm, mini storage warehouses, large office industrial complexes and several additional warehouses and industrial complexes.

THE COURT: Generally on that photograph, indicate for me the flood plain areas.

[47] THE WITNESS: The flood plain area extends from the Green River on the west, which you can see quite distinctly outlined, and actually the bottom of the hill which is east of the freeway, but generally speaking from the freeway to the river and northerly actually off of this photograph.

THE COURT: Goes even substantially farther?

THE WITNESS: That's correct. As it relates to this map, would extend from here all the way to those railroad tracks. This photograph cuts off at approximately this location.

THE COURT: All right, thank you.

Q. (By Mr. Warren) If I could follow up on that, Mr. Clemens. Are there any plans for development to the north of the Interstate 405 in that floodway area?

A. Yes, sir, there are.

Q. And what types?

A. A variety of office and industrial uses.

Q. Are they small developments or large in scope?

A. The Koll Development, which was spoken to earlier, the entire development is quite large if you consider in excess of a hundred acres total development as being large.

Q. And the other uses that are planned to the north there in the flood area?

[48] A. At the north, there are a variety of relatively smaller uses that might be two to five acres, possibly as much as ten acres in size that are under consideration.

Q. Now, you previously mentioned the Metro Sewer Waste System Facility. Is this in the floodway area here?

A. The treatment plant itself is outside of the floodway area. There is a berm around the facility to protect

it from flooding so that it will continue to operate even in a flood.

THE COURT: That's area C, is it?

THE WITNESS: B, your Honor.

MR. WARREN: That's all the questions I have, your Honor.

MR. SMITH: Very briefly, your Honor, if I may?

THE COURT: I have a few more myself.

MR. SMITH: I'm sorry.

THE COURT: With respect to area B, it is my understanding that approximately three-quarters of that area is presently taken up with the sewage treatment plant?

THE WITNESS: That is correct.

THE COURT: An approximation.

THE WITNESS: Approximation.

[49] THE COURT: One-quarter of it is presently vacant property developable; is that correct?

THE WITNESS: Yes, that's correct.

THE COURT: I thought there was mention of a third use in that area.

THE WITNESS: There's existing railroad—partially abandoned and partially existing railroad spurs in that vicinity.

THE COURT: All right. A itself, is that all Boeing property?

THE WITNESS: To the best of my knowledge, it's all within their complex.

THE COURT: As a practical matter, not developable?

THE WITNESS: For an alternate use at this time, it would be difficult, I would think.

THE COURT: Approximately one-third of D would be outside the racetrack property itself; is that correct?

THE WITNESS: The property may be in the ownership of the racetrack, but it's an area which is only used on the rarest of occasions for overflow parking.

THE COURT: The entire area, the entirety of area D is either used as part of the racetrack [50] facility itself or alternatively, for overflow parking?

THE WITNESS: It has been used for overflow parking.

THE COURT: Is the entirety of that area in one ownership?

THE WITNESS: I can't tell you for sure.

THE COURT: All right. Thank you.

MR. SMITH: May I?

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Sir, you indicated the flood plain and you pointed generally to the left-hand bottom corner of the map. Isn't there a substantial amount of marshland in one of these areas that's owned by the City?

A. No, sir. It's outside of all of the areas that are shown in green.

Q. The judge before asked you about were there areas within the flood plain other than those marked and identified in green. You indicated there were such areas; is that correct?

A. Yes, that's correct.

Q. As part of that area that's outside the green is marshland that is owned by the City; is that correct?

A. That's correct.

[51] Q. Now, you were asked by counsel about in the flood plain if someone could build up or fill in land, put up a building; is that correct?

A. That's correct.

Q. What would they do with regard to roads? Would roads also have to be built up?

A. Yes, sir.

Q. Who would bear the responsibility financially of building up the roads?

A. The proposed developer would be responsible for access to his site.

Q. Is that if Playtime Theatres wants to put an adult theatre in the flood plain, they would have to build up the

site and then arrange to pay for the cost of the road going in; is that correct?

A. Unless the roadway was already there.

Q. All right.

A. It would be—

Q. If it were there, would it not have to be built up under the new ordinance?

A. If it's an existing roadway, there would be no additional requirement.

Q. You indicated that when the cul de sacs were completed, that an adult theatre use could be put in there; is that correct?

[52] A. That's correct.

Q. When is it going to be completed?

A. Burlington Northern Railroad Company owns the largest share, particularly of area E. They are currently under bond to the City of Renton to complete those roadways within the time limits of our ordinance, which would be within the next one to two years, I believe.

Q. So the Burlington Northern owns the greater part of the property in that designated area E?

A. In area E.

Q. All right. And what is that to be used for under the comprehensive plan?

A. The comprehensive plan indicates the area as potentially—if I might, your Honor? I would like to be precise. Exhibit 4, I believe.

MR. SMITH: I have an extra copy.

THE COURT: The Clerk will provide him with Exhibit 4.

(Document handed to witness.)

THE WITNESS: I'm sorry. Exhibit 3, the colored map.

(Document handed to witness.)

THE WITNESS: Thank you. The area is designated on the comprehensive plan as being [53] potentially appropriate for manufacturing park use.

Q. (By Mr. Smith) All right. And that covers the entire area, does it not, sir, of E and D; is that correct?

A. No, sir. Area D, according to our comprehensive plan, is designated as a recreational area.

Q. That's because it is a racetrack; is that correct?

A. I was not present when it occurred. I would assume that's the case.

Q. As it is designated on this revised edition of January, 1980, does it not include for that recreation area the entire parking lot that's used an overflow; is that not correct?

A. I believe that's the case.

Q. If the entire area other than the racetrack and the parking area is zoned as a manufacturing park, and most of that is under contract, you say under bond with Burlington?

A. Burlington Northern.

Q. Is there any possibility that an adult theatre could be placed there today?

A. At this time, yes, sir.

Q. Yes? When they are under contract with rail spurs and cul de sacs and everything else that's being done there?

[54] A. As far as the zoning of the City of Renton is concerned, an adult theatre would be allowable use within the areas designated industrial park.

Q. Sir, would you look at that and is there a designation on there where you would find the waste disposal plant?

A. Yes, sir.

Q. Is there any part of area B that is not within the waste disposal plant set forth in the comprehensive plan?

A. Yes, sir. There are parts—

Q. Would you show us where that is, based on this map?

A. The southerly, the very southerly-most portion of that is designated as a manufacturing park on the comprehensive plan.

Q. Well, there's a road going through here. Have you found that on the map that you have in front of you?

A. Yes, I have.

Q. And the area that is designated as B is north of that road?

A. That's correct.

Q. Correct? And you identified this sort of indentation on your map there?

A. Yes, I do.

Q. Now, are you talking about the heavy manufacturing [55] section that would appear to be at the bottom part of area B? Is that—

A. No. That's manufacturing park, sir, according to the plan designation.

Q. What's the black location there?

A. There is no—there's not a black designation. That's a quasi public designation indicating the treatment plant itself.

Q. The treatment plant? So what part of this area is the treatment plant, based upon observing the map that you have here, the comprehensive plan?

A. The southerly portion of that is outside of the treatment plant, and, according to this comprehensive plan, it would be designated as a manufacturing park.

Q. And there's a railroad junction here, is there not?

A. No, sir. It doesn't exist any longer.

MR. SMITH: I have no further questions, your Honor.

RECROSS-EXAMINATION

BY MR. WARREN:

Q. Very briefly, Mr. Clemens, since counsel has brought into question the roads. Can you explain to the court the present roadway that exists on the south end [56] of the City limits? How many lanes of traffic does that support now?

A. Currently two.

Q. Are there plans for more?

A. The City is currently under contract to widen that street to five lanes.

Q. The circulation roadway in the industrial area down here, can you explain to the Court the number of lanes on Lind Avenue?

A. There are four moving lanes with turning lanes at the street intersections.

Q. How does that run throughout that industrial area?

A. North—it runs north-south all the way from the south edge of the map northerly into the central portion of the City beyond 405.

Q. Are there any plans to develop any other roads in this area that you're familiar with?

A. Yes, sir. The City has authorized local improvement District No. 314, which will provide a number of improvements to existing streets plus extend in particular Southwest 27th Street, which will enter the southerly end of the Longacres Racetrack. That would be the southerly edge of area D.

Q. This area?

A. That's correct.

[57] Q. Do you know the number of lanes that are planned for Southwest 27th?

A. I believe it's four moving lanes.

MR. WARREN: That's all the questions I have.

FURTHER REDIRECT EXAMINATION

BY MR. SMITH:

Q. Those plans will ripen into fruition for the extension of two to five lanes when, sir?

A. We're under contract now. The construction would commence as soon as the weather is permitting.

Q. How long is it expected to take to complete?

A. Just guessing—I'm not an engineer—but I would assume between a year and 18 months.

Q. And the other roads that you indicated were going to be built there, are they under contract?

A. No, sir, they are not.

Q. When will they be built, if you know?

A. Again, the LID 314 improvements are expected to commence sometime this year and would take, again, about the same period of time.

MR. SMITH: Thank you.

MR. WARREN: No further questions, your Honor.

[58] THE COURT: The area that is in E, despite all the plans to widen roads and put in other roads right now, there is an industrial park in existence there, is there not?

THE WITNESS: On a portion of it, that is correct.

THE COURT: And there are roads permitting access to and from that area?

THE WITNESS: That is correct.

THE COURT: Thank you. That's all I have. Anything further from this witness?

MR. SMITH: No, sir.

* * * *

[EXHIBIT 2]

RESOLUTION NO. 2421

WHEREAS, the City of Renton has been informed by the Federal Emergency Management Agency that its computation of the 100 year flood level may be incorrect, and

WHEREAS, there is no presently reliable date with which to calculate the actual elevation of the 100 year flood, and

WHEREAS, it is necesasry and advisable and in the public interest to notify permittees of the City of Renton whose construction permits may lie within the Green River Industrial Area of such lack of reliable data,

NOW THEREFORE, the City Council of the City of Renton do resolve as follows:

SECTION I. The above recitals are found to be true in all respects.

SECTION II. That the administration of the City of Renton is directed to issue a Notice of Disclaimer and to obtain an acknowledgment of such Notice for each applicant who is issued a building, construction or use permit within the Green River Industrial Area in the form as attached hereto as Attachment "A".

SECTION III. That the City Council of the City of Renton hold a public meeting on October 26, 1981, at 8:00 P.M. to consider testimony from the general public for the necessity of such Notice of Disclaimer and acknowledgment thereof by permittees of the City of Renton, and the necessity for recording of this resolution as constructive notice to all parties of the inability of the Federal Emergency Management Agency to compute the actual elevation of the 100 year flood.

SECTION IV. That the Administration of the City of Renton is authorized to approve an estimated safe flood zone within the Green River Industrial Area for purposes

of determining which permittees must be required to acknowledge receipt of the Notice of Disclaimer.

PASSED BY THE CITY COUNCIL this 21st day of September, 1981.

/s/ Delores A. Mead
DELORES A. MEAD
City Clerk

APPROVED BY THE MAYOR this 21st day of September, 1981.

/s/ Barbara Y. Shinpoch
BARBARA Y. SHINPOCH
Mayor

Approved as to form:

/s/ Lawrence J. Warren
LAWRENCE J. WARREN
City Attorney

NOTICE OF DISCLAIMER

TO: Permittee—Permit No. _____

RE: Construction Permits within Green River Industrial Area

You are notified that the City of Renton has received some indication that the data used to compute the level of the 100 year flood for purposes of calculating the minimum building elevation may be incorrect. The Federal Emergency Management Agency has computed the hypothetical level of the 100 year flood for purposes of flood insurance coverage and building elevation. However, there is no presently reliable data with which to calculate the actual elevation of the 100 year flood.

Therefore, the City of Renton disclaims any liability for all damages which may be sustained by you for property damage, or otherwise, based upon the City's issuance of the above stated permit. You are advised to seek your own consultant for counsel concerning the advisability of commencing construction based upon the above stated permit.

DATED: _____

CITY OF RENTON

By _____
Building Department

ACKNOWLEDGMENT

I acknowledge receipt of this Notice of Disclaimer, and I understand that the City of Renton will not issue the above stated permit without my execution of this acknowledgment. I understand that this Notice is given as a protection to me to avoid potential damage to person and/or property which I may sustain by reason of flooding.

In consideration of the issuance by the City of Renton of the above stated permit, I agree to release and hold harmless the City of Renton from all damages which may be sustained by me or anyone holding any interest in the real property owned by me, including lessees or purchasers from me, whether property damage or otherwise, based upon the issuance by the City of Renton of the above stated permit.

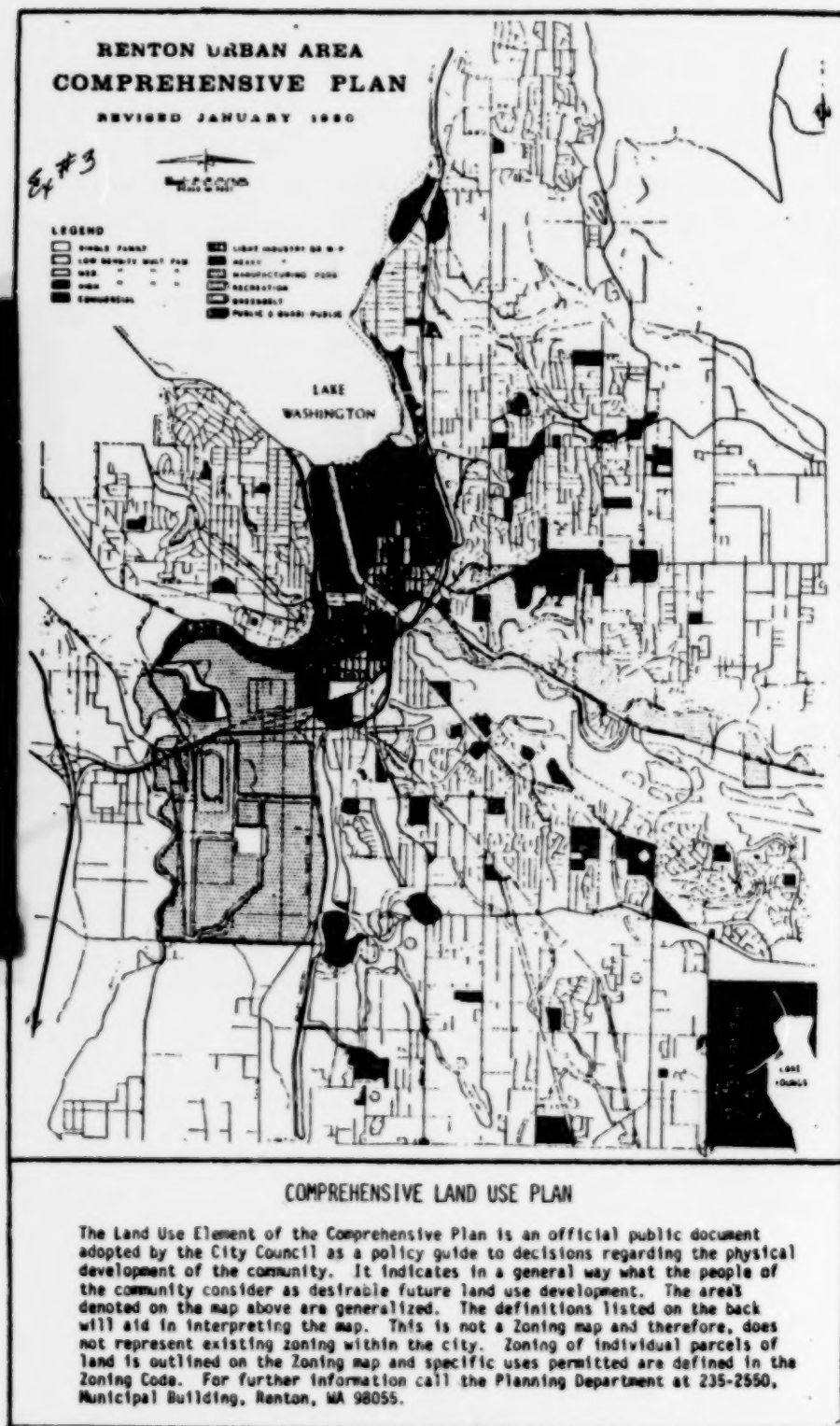
I further agree to deliver to all lessees or purchasers who may now or hereafter hold any interest in the real property owned by me, a copy of this Notice of Disclaimer.

By requesting the issuance of the above stated permit by the City of Renton I assume all risks of proceeding with construction based upon the permit.

DATED: _____

Permitee

[EXHIBIT 3]

COMPREHENSIVE PLAN LAND USE
DESIGNATIONS*SINGLE FAMILY RESIDENTIAL*

An area intended to be occupied by a single family dwelling unit or related compatible uses.

LOW DENSITY MULTI-FAMILY RESIDENTIAL

An area intended for two-family dwellings and limited special uses.

MEDIUM DENSITY MULTI-FAMILY RESIDENTIAL

An area intended for Medium Density/Medium Rise residential uses such as apartments and townhouses.

HIGH DENSITY MULTI-FAMILY

An area intended for residential uses allowing the maximum number of dwelling units, the maximum number of stories, and the maximum proportion of land area coverage permitted in the city.

COMMERCIAL

An area intended as a retail area with some non-industrial wholesale and service activities, office buildings, and uses devoted to the traveling public, such as hotels and motels.

MANUFACTURING PARK

An area designated as having light and certain compatible heavy industrial uses with selected commercial uses in a manufacturing park type development which includes, but is not limited to, adequate setbacks, landscaping, functional design, compatibility with adjacent uses, open space, wildlife habitat, and perhaps joint use of facilities.

LIGHT INDUSTRY OR MANUFACTURING PARK

An area designed as having industrial activities and uses involving the processing, handling and creating of products, also research and technological processes which are devoid of nuisance factors, hazard, or excessive demands upon public facilities and services.

HEAVY INDUSTRY

An area designated as having industrial activities and uses involving manufacturing, assembling and processing, bulk handling of products, large amounts of storage, warehousing, heavy trucking and all other uses, excluding single family and duplex residential dwellings.

PUBLIC AND QUASI-PUBLIC

Those areas in which publicly and certain privately owned uses are located, which include utilities, health care, churches, clubs, or philanthropic institutions primarily designed to promote the public welfare or serve the public on a non-profit basis.

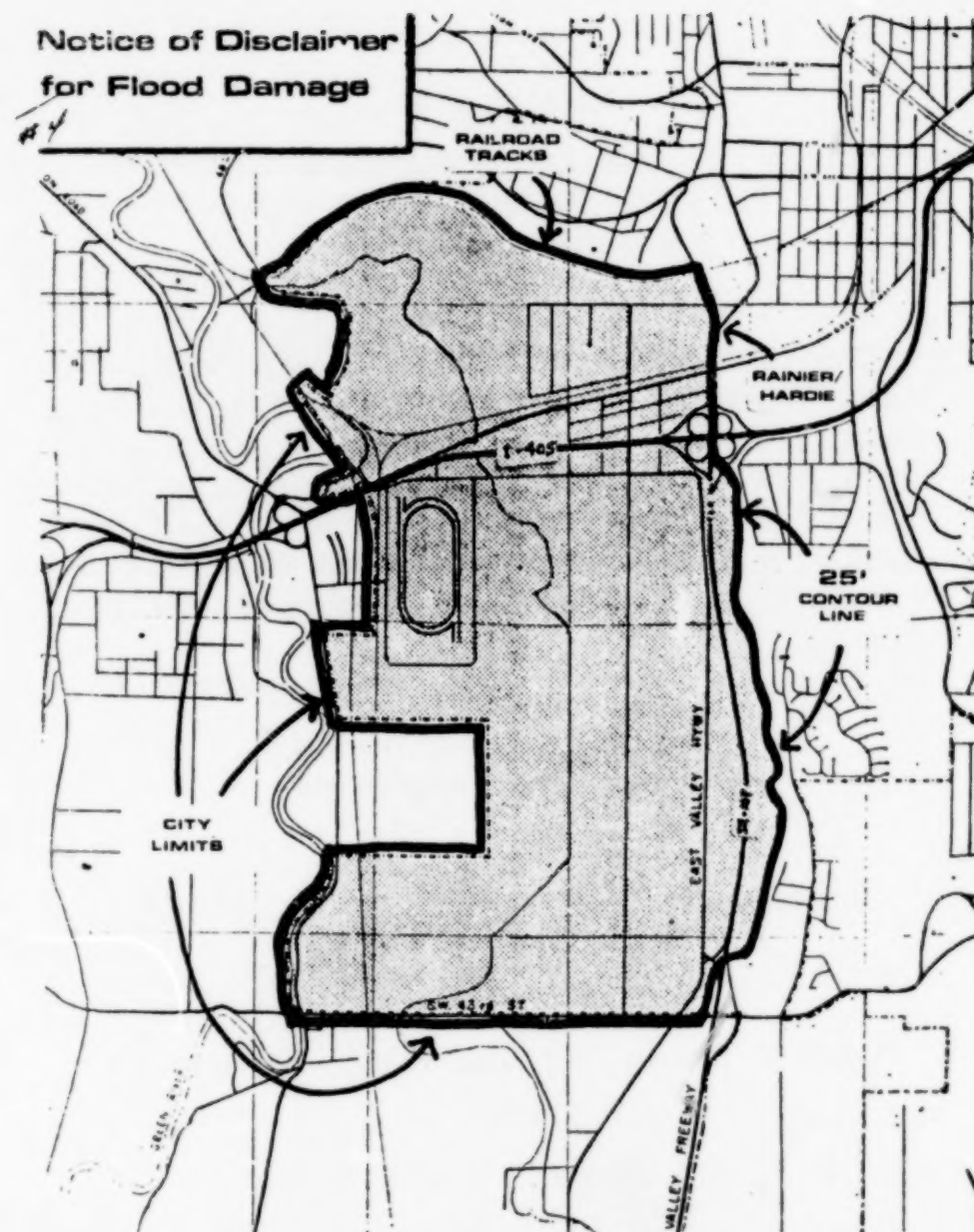
RECREATION

Those areas designated primarily for leisure time pursuits by members of the public, for active and passive recreation which includes such land uses as parks and playgrounds.

GREEN BELT (LIMITED DEVELOPMENT AREA)

An area with severe topographic, ground water, slide potential or other physical conditions which impair development, and is intended to be developed in extremely low density single family, recreation, open space, or other compatible low density use.

[EXHIBIT 4]



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C 82-59 M

PLAYTIME THEATERS, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
vs. *Plaintiff,*

THE CITY OF RENTON, and THE HONORABLE BARBARA Y.
SHINPOCH, as Mayor of the City of Renton and EARL
CLYMER, ROBERT HUGHES, NANCY MATHEWS, JOHN
REED, RANDY ROCKHILL, RICHARD STREDICKE, and TOM
TRIMM, as members of the City Council of the City of
Renton; Served on DELORES A. MEAD, City Clerk and
JIM BOURASA, as Acting Chief of Police of the City of
Renton,

Defendants,

jointly and severally, in their
representative capacities only

DEPOSITION UPON ORAL EXAMINATION OF
DAVID R. CLEMENS, VOLUME I

Taken at Renton City Hall, Renton Washington

DATE TAKEN: March 3, 1982

COURT REPORTER: PEGGY MITCHELL, RPR

BURTON, WILKERSON & PHELPS, INC.
Registered Professional Reporters
1206 Bank of California Center
Seattle, Washington 98164
(206) 623-7178

APPEARANCES

For the Plaintiffs:

JACK R. BURNS
Hubbard, Burns & Meyer
10604 NE 38th Place
Kirkland, Washington 98033

For the Defendants:

DANIEL KELLOGG
MARK E. BARBER
Warren & Kellogg, P.S.
100 South Second Street
Renton, Washington 98057

Also present: Ron Nelson

INDEX

ATTORNEY

Mr. Burns

EXAMINATION

pg. 2

EXHIBITS

NO.

DESCRIPTION

MARKED

1

Map

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[2]

RENTON, WASHINGTON;
WEDNESDAY, MARCH 3, 1982

1:00 p.m.

DAVID R. CLEMENS

having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BURNS:

Q This is a deposition of David Clemens being taken pursuant to notice and a subpoena; as well, Mr. Clemens as been designated by the City of Renton to testify with respect to certain matters relating to the zoning laws of the City of Renton and the building requirements relative to the construction of theaters within the corporate limits of the City of Renton, and pursuant to the Rules of Federal procedure.

Mr. Clemens, would you state your name and address for the record, please?

A David R. Clemens. 201 Mill Avenue South, Renton, Washington. 98055.

Q And are you married, Mr. Clemens?

A Yes, I am.

Q Do you have any children?

A No.

[3] Q And how old are you?

A 36.

Q What's your educational background, sir?

A I have a Bachelor of Science degree in industrial design from San Jose State University. Post graduate certificate in city and regional planning from the University of California at Berkley.

Q That's a post graduate certificate?

A Certificate.

Q What kind of course of study is required to get that post graduate certificate?

A There are four core courses administered by the university, followed by two elective courses at any other accredited university, followed by the receipt of a certificate.

Q Is that something like a Masters Degree or is it something else?

A It would fall somewhere between a Bachelors and a Masters Degree. It is not a full Masters Degree.

Q Do you have any other educational or have you attended any other educational institute doing post graduate work?

A No.

Q And when did you complete this post graduate certificate program at the University of California?

[4] A I believe it was in August of 1974.

Q Thereafter, did you seek employment in the job market?

A I was previously employed in the job market since 1971.

Q Where was that?

A City of Milpitas, M-I-L-P-I-T-A-S, California.

Q And when did you leave the City of Milpitas?

A In August of 1978.

Q And during the time that you were employed by that city, what positions did you hold?

A Virtually all positions within the City's Planning Department ending with four years as principal planner for the City of Milpitas, that would be the person in charge of the planning section of the Community Development Department of the city.

Q And after August of '78, where did you go?

A City of Renton.

Q Have you been employed by the City of Renton since that time continuously?

A That's correct.

Q And what positions have you held at the City of Renton?

A Assistant planner, associate planner, senior planner, acting planning director and policy development [5] director.

Q Now, during what period of time did you hold the job as assistant planner?

A I believe from September of '78 through the spring of 1979. Would have been April or May approximately.

Q In general terms, what were your duties as an assistant planner?

A As assistant planner, I was responsible for zoning enforcement and interpretation for the City of Renton.

Q In connection with that, would you review every building permit or application to determine whether it complied with the zoning laws and things of that nature?

A That's correct.

Q As an associate planner, what were your—strike that.

How long were you associate planner?

A I believe it was a period of about two months, transition between assistant planner and senior planner.

Q How did your duties vary as associate planner?

A No change.

Q Distinction without a difference?

A Simply different title for doing the same work.

Q As a senior—when did you become a senior planner?

[6] A I believe it was roughly mid year of 1979. June or July.

Q What were your duties as a senior planner?

A As senior planner, I was responsible for comprehensive planning for the City of Renton, development of the comprehensive plan, working with the planning commission in development of plans and implementing policies.

Q When did you become the acting planning director?

A January of 1980. I am sorry. January of 1981. Missed a year.

Q So for approximately a year and a half, you were a senior planner and then you became the acting planning director.

A That's correct.

Q I take it the planning director had left.

A Yes.

Q And who was the planning director just prior to your becoming acting planning director?

A Gordon Y. Erickson, S-O-N.

Q And was he generally your supervisor while you were associate planner, senior planner?

A That's correct.

Q And when did you become policy development director?

A December 1st of 1981.

[7] Q Was there a policy development director prior to December 1 of 1981?

A No.

Q So it is a newly created position?

A That's correct.

Q Is it—there now a planning director or is it a combined function?

A There is no planning director. The typical zoning enforcement administrations functions are now in the combined building and zoning department. The policy development department is almost exclusively involved now in long-range planning and policy development.

Q So as planning director, did you deal with building and zoning enforcement?

A Yes.

Q And now as policy development director, your duties have changed somewhat?

A To emphasize comprehensive planning rather than individual permit review and administration.

Q Is there someone who is in charge of zoning at this particular time, zoning enforcement and review?

A The department head would be Mr. Ron Nelson, building director.

Q That is the gentleman seated down here at the end of the table?

[8] A That's correct.

Q Are you generally his supervisor?

A No. We are mutual exclusive department heads.

Q In the chain of command, you go down one branch and he goes down a different branch somewhere and you both have a supervisor that's above you somewhere along the line.

A That would be the Mayor.

Q So you are responsible—are you directly responsible to the Mayor?

A Yes.

Q And the Mayor is your immediate supervisor?

A That's correct.

Q And would the same be true of Mr. Nelson?

A Yes.

Q Now, you were asked to bring with you certain documents or—strike that.

You were served with a subpoena duces tecum?

A Yes.

Q You were asked to bring with you certain documents and you have brought those documents with you or are they in the packet of materials that were supplied to me?

A In the packet of materials supplied.

[9] Q So any summary of findings or conclusions relative to the zoning regulation of adult theaters in the City of Seattle?

A Those are retained in those documents.

Q And all material regarding the regulation of adult businesses reviewed or considered by you or your staff prior to the adoption of this Ordinance are in these materials?

A I believe those are one and the same.

Q And all other materials used by you in reviewing locational problems associated with adult businesses and used by you in advising the City Council planning staff or planning development committee of the City of Renton prior to or during the adoption of this Ordinance are in these materials?

A That's correct, I believe they are the same.

Q And you have available to you somewhere here today all detailed maps, drawings or photographs prepared by you which show those portions of the City which are not subject to the locational restrictions of the Ordinance?

A Okay. The map that was prepared during the time of the Ordinance adoption was destroyed shortly after the—shortly after or at the same time as the adoption took place, so the original maps are not [10] available.

Q Do you have any maps available today that you are currently using?

A The map within the affidavit is available that was in the previous testimony and we have prepared maps for the City Attorneys office at their request.

Q Now, there is—I had asked that you bring with you a comprehensive report from the City Attorneys identified in your affidavit relating to the proper scope of land use, regulations and experience from other cities and your attorneys have objected to that document. Are you familiar with that document?

A I have read it.

Q And when did you first see that document?

A I can't give you a precise date, but it would have been a period of probably two to three months prior to the adoption of the Ordinance.

Q Do you recall who the document was addressed to?

A No, sir, I don't.

Q Who gave you the document?

A To the best of my recollection, it came through the City's normal routing system in an envelope marked "confidential." I do not recall whether that was from the Mayor's office or from the attorneys office.

[11] Q And when you received that document, were you the acting planning director, senior planner, associate planner or assistant planner?

A I am not positive. I don't recall precisely. It could have been while I was still a senior planner. I don't recall precisely.

Q When you say it came through the normal routing channels or routing system, what is that system?

A City has series of mailboxes in the printshop area for each of the departments, and the section or clerical staff make pickup and deliveries from that facility.

Q And was this a document that was just left in a box with your name on it?

A I don't recall precisely what the envelope looked like. The only thing I recall for sure is that it did say "confidential" on it and it was sealed.

Q Did you—I take it you opened that and examined it?

A Yes.

Q Did you show the document to anyone?

A I assume that it was reviewed by both myself and staff people working for me.

Q And who were those staff people?

A At that time it probably would have been Gene Williams, or Roger Bloylock. B-L-O-Y-L-O-C-K.

[12] Q Did you discuss the contents of the letter or the report with anyone?

A Probably with those two staff people. And if—if I was still senior planner at the time, also with Mr. Erickson. As I say, I don't recall at the moment that I received it whether it—I was senior planner or acting director at that time.

Q Was that or—strike that.

You were in attendance at all City Council meetings, planning committee meetings and planning commission meetings involving the adoption of Ordinance No. 3526, were you not?

A City Council committees and council meetings. I was not involved in the prior discussion that was held with the planning commission. Mr. Erickson was directly responsible for that.

Q Did—was this report that we are referring to from the attorneys, was that ever discussed or referred to at any of the meetings that you attended?

A It was discussed at the planning and development committee. I do not recall whether it was discussed on the floor of the City Council.

Q And was that planning development committee meeting a public meeting?

A Yes, it was.

[13] Q And could you recall for me the best you can the context of the discussion about that document and what was said and by whom?

A To the best of my recollection, the assistant city attorney, Mr. Kellogg, was discussing the difficulties in drafting and ultimately enforcing regulations on adult entertainment land uses.

Q Was he, in fact, reading from his report?

MR. BARBER: Object to the form of the question. Go ahead.

A He may have read excerpts from it. He did not read the—its entirety. I would say that he probably summarized the key points.

BY MR. BURNS:

Q Do you recall any other occasion that that document was discussed in a public meeting?

A No.

MR. BURNS: Counsel, based on this testimony, it appears whatever confidentiality may have been attached to that document was waived by excerpts of it being read and its contents being discussed at a public meeting, and so I would request that it be produced.

MR. BARBER: Well, we disagree that there were necessarily excerpts of that report read at the [14] public hearing. And we will assert the privilege. Feel it is clearly covered by attorney-client privilege that it was transmitted among the City, as testimony has indicated, to various city employees in a confidential—an envelope marked "confidential" and we think it is clear it is covered by the attorney-client privilege. We will not produce it voluntarily.

MR. BURNS: I didn't expect you would.

BY MR. BURNS:

Q Mr. Clemens, at that planning and development committee meeting, are any transcripts kept of those meetings?

A No.

Q Any public record kept of those meetings?

A To the best of my recollection, there may have been notes prepared by myself, by the Council members that were present, possibly by the attorneys office, but no formal record in the form of minutes or similar document has been prepared or was prepared.

Q There are no tape recordings or videotapes or any of—

A No, no, sir.

Q As far as that.

Mr. Clemens, in your capacity as senior planner, acting planning director and now director of [15] policy development, are you aware of any documents that exist within the official records of the Renton or any of its agencies which would relate to the passage of Ordinance No. 3526 which have not been produced today in the packets that counsel gave me when we began?

A Not to the best of my knowledge.

Q So to the best of your knowledge, there is nothing other than what is in these packets that would exist that would relate to this Ordinance; is that what you said?

A That's correct.

Q And have you had an opportunity to search and review all the records in coming to that conclusion?

A Yes.

Q Mr. Clemens, for the purposes of a preliminary injunction hearing, you prepared an affidavit to which was attached a map. Do you recall that affidavit and the map?

A Yes, I do.

Q On that map, certain areas were identified by you as being locations where Ordinance No. 3526 does not

apply. Are you familiar with the way you had labeled that map?

A That's correct.

[16] Q For the purposes of our discussions today and tomorrow, are there—are these areas that were marked on that map the only areas where Ordinance No. 3526 does not apply?

A To the best of my knowledge, that's correct.

Q So you have not, since this original affidavit, discovered other areas that may be of concern to us.

A No.

Q Now, for the purposes of our discussion today, I have put on the bulliten board here a map which is entitled "A Zoning Map of the City of Renton" with a date—effective date of June 19, 1981. Are you familiar with that map?

A Yes, sir, I am.

Q And is that identical in major terms to the map which was attached to your affidavit?

A Yes.

Q And is this the current zoning map in effect for the City of Renton?

A There may have been revisions since that time, but none of substance that would affect this Ordinance, to the best of my knowledge.

Q Now, are the zones indicated on this map the current zones—strike that.

I have marked certain areas on this map in [17] red. And let me label them as 1, 2, 3, 4, and 5. Without getting into the exact detail of the locations, are those five areas the general areas that are marked on your map?

A That's correct.

Q Now, are those areas also currently zoned as indicated on this map?

A Yes, to the best of my knowledge they are.

Q So for Area 1, we are talking about an H-1 zone?

A That's correct.

Q For Area 2, we are talking about, I guess, a G zone?

A I believe there may be some light industrial in there. We have done some.

Q Down in this area?

A Yes.

Q And in Area 3, we are talking about probably a M-P zone?

A Correct.

Q For Area 4, we are talking about a B-1 down to a M-P and maybe a G?

A Correct.

Q And for Area No. 5, we are talking about M-P, H-1, L-1 and may be a little G; is that correct?

A That's correct.

Q Now, for the purposes of our discussion today, could [18] you come over here and mark on this bigger scale map, to the best of your ability, the exact boundaries of the areas identified on your map?

MR. BARBER: We will object to that. If you want to ask Mr. Clemens questions and have him answer referring to the map, that's fine, but we will not—we will direct him not to step to the map and to mark upon it.

MR. BURNS: Why?

MR. BARBER: Purpose of the deposition is to examine him orally.

MR. BURNS: Well, Mr.—he can—

BY MR. BURNS:

Q Mr. Clemens, with regard to this area that I have marked as No 2, which is shown on your map, how far to the north of this map does it extend?

A The area in question in Area No. 2 in all probability does not exist due to the Section, I believe it is 2 of the Ordinance. Let me check the precise language. I am sorry, Section B.

Q Section B of what?

A It is Section 4-735(B), which is the codification of—in Ordinance 3526.

Q Is it your testimony today then that the area marked as No. 2 on this map is not an available location [19] pursuant to Ordinance No. 3526?

A I believe that to be the case.

Q So in terms of the words used on your map, which was attached to your affidavit, Ordinance No. 3526 would apply in that area.

A That's correct.

(Discussion off the record)

BY MR. BURNS:

Q And going a step further so that it is absolutely crystal clear what your testimony is, if I wanted to locate an adult theater in this area marked roughly by Exhibit 2 or by No. 2 on this map, under the provisions of—in Ordinance No. 3526, I could not do so?

A I believe that would be the case.

Q Now—

A Can I have just a second?

Q Sure.

(Discussion off the record)

BY MR. BURNS:

Q Is there anything you want to add to your answer?

A No.

Q Now, we indicated or you previously testified that some of Area 2 may be covered by the designation L-1. Were you referring to the area down within the [20] intersection of these railroad tracks?

A Yes.

Q Is this whole area shown by No. 2 on this map and what is an attempt to approximate the area shown on your map, is that whole area unavailable for use as an adult theater or is there some area that extends down into the junction of the railroad tracks that may be available?

A There may be. I do not recall at the present time whether the mapping that we prepared for the Attorneys office includes a parcel within that area or not.

Q So there may be a parcel within the junction of these railroad tracks which is available.

A It is possible.

Q Now, let me label that on the map as No. 6. And you see where I put the No. 6?

A Yes.

Q And let me draw boundaries around it. Is that the area where you're now indicating that there may be a possible location but you're not sure?

A Either in that precise location or immediately adjacent to the south or west.

Q Immediately adjacent to the south or west. Could you come over here and point where you're referring to?

[21] A I believe if you simply extend the No. 6 that you have there slightly east and west from that location, that there may be a parcel in there that would apply.

Q Do you mean in this direction or towards this river?

A Yes. Westerly from the 6 towards the river.

Q And easterly over into this direction.

A In that general area there may be, but my recollection is not crystal clear.

Q Now, the area that we have designated with a No. 3, is that area, as I marked it on this map, a correct representation of the area shown on your map?

A It may be a little bit small, but it is essentially the correct geographical location.

Q And could you tell me if there are any streets that bound that particular location so that we can identify it with particularity?

A I believe the location is illustrated on the exhibit contained in my affidavit adjoined Powell Avenue Southwest.

Q And is Powell Southwest on its easterly side or is that on its southeasterly side?

A It would be on its easterly side.

Q Can you tell me what the approximate area of that location is in gross square feet?

MR. BARBER: If you know.

[22] A I have never measured it precisely, but it would be several acres in size.

BY MR. BURNS:

Q The area shown on your map is several acres in size?

A That is correct.

Q Now, the area shown by No. 4, I don't believe that this map correctly depicts it. Does that area extend more down like this?

A That's correct.

Q It includes all the way to the corporate limits of Tukwila that are shown on this map?

A That's correct.

Q And otherwise is it approximate within reason the area shown on your map?

A Yes, it does.

Q Does it extend any further to the north?

A I don't believe that it does. Without reviewing the maps we prepared for the attorneys office, I couldn't say precisely, but that appears to be generally the area illustrated on this map.

Q Now, generally, this area you are aware is owned by the Longacres Racetrack or whoever owns that particular property; is that correct?

A Yes, the majority of that is.

Q Now, all of this, is there any of this area [23] designated by No. 4 which is outside the Longacres Racetrack complex that you know of?

A I am not aware of the condition of the area shown on the map and designated with the zoning symbol G.

Q Down here at the bottom?

A The southerly piece. I am not aware whether that is specifically a part of the Longacres complex or not.

Q Now, with particular or drawing your attention particularly to the area on the east of Area No. 4, which appears to come out to the point on your map, do you see where I am referring to?

A Yes.

Q And I will mark that with an A so that we know what we are referring to.

Does any of that property extend or does that point extend beyond the Longacres Racetrack property, to your knowledge?

A I don't recollect the dimensions illustrated in the map we prepared for the Attorneys office. I believe that it is generally coterminous with the easterly property line of the racetrack.

Q And by that you mean it is all within the boundaries of the racetrack property?

A To the best of my recollection.

Q Now, who within the City of Renton's structure is [24] responsible for making the determination of these exact boundaries?

A It would be our office in conjunction with the building and zoning department to prepare an analysis of whether a particular parcel was within or without the regulations.

Q So it would be your responsibility and Mr. Nelson, who is sitting at the end of the table.

A Yes.

Q And you have made a determination as to the exact location of this easterly point in your capacity?

A For the purposes of review by the City Council.

Q For the purpose of review by the City Council.

A No. The City Attorneys office, I'm sorry.

Q But that's your responsibility to do that, is it not, if somebody were asked to do that?

A Yes.

Q And you have done that.

A That is correct.

Q Could I see a copy of that?

MR. BARBER: I object on the ground it is work product.

MR. BURNS: This is the gentleman who has got to make the determination. I want to know where the boundaries are and you are telling me you aren't [25] going to tell me where the boundaries are, you're going to keep it a secret?

MR. BARBER: I am telling you he prepared a map for the City Attorneys office at his counsel's request and that that was in anticipation after this litigation was started and it is work product.

BY MR. BURNS:

Q Well, will you prepare for me, will you as the responsible city official for determining, Mr. Clemens, the exact location of these boundaries and as the person who is responsible for making that determination, will you determine for me the exact easterly boundary of this area on your map?

A If the Attorneys office advises that we can, we would.

(Discussion off the record)

MR. BURNS: Will you ask him to do that or will you provide for me the exact location of this easterly boundary here?

MR. BARBER: We will not provide the map that we previously obtained on the ground it was privileged. If you wish to ask Mr. Clemens questions to ascertain the extent of his knowledge as to the easterly boundary, you may do so during this deposition.

[26] MR. BURNS: Let me ask it once again, Mr. Clemens.

BY MR. BURNS:

Q Does any of this property shown by No. 4 and particularly the point identified by A extend beyond the boundaries of the property owned by Longacres, a definite yes or no?

A I can't give you a definite yes or no.

Q But you have mapped that out for the City Attorneys.

A That's correct.

Q And they know one way or another whether it extends beyond or not.

MR. BARBER: I object to that question. Don't answer.

BY MR. BURNS:

Q But you have mapped that out for the City Attorneys?

A Yes.

Q And why can't you tell me or give me an answer to that today?

A The information that would be necessary to determine it is in the material that we prepared for the Attorneys office. I do not have in my head every parcel that is zoned or contains a single family use or is within the other prescribed limits of the Ordinance.

[27] Q Then to the best of your recollection, to the best of your knowledge, that property is all within the limitations of the Longacres property, subject to review of the material that you have prepared for the City Attorneys?

A Yes.

Q Is that material available to you?

A Yes, I assume so.

Q And could you review it and have an answer for me tomorrow when we continue this deposition as to whether or not that property is within the limits of Longacres or not?

MR. BARBER: He has already given his answer. We would object to that.

MR. BURNS: I want the record to reflect that Counsel for the City shook his head and indicated that he would not allow Mr. Clemens to review that material over the evening recess and have a complete answer for me tomorrow.

BY MR. BURNS:

Q Mr. Clemens, the area that I have identified with a No. 5, is this area roughly the same as the area shown on your map attached to your affidavit?

A With the exception of I believe it is—has slightly more east and northerly tilt. It is generally as [28] depicted.

Q When you say easterly, would you mean more in this direction?

A That's correct.

Q And how far to the east would it go with my pencil, over to approximately here?

A I cannot say precisely without reviewing the material prepared for the Attorneys office.

Q And that's all in the City Attorneys' office?

A That's correct.

Q Let me draw a line there just to approximate more to the east. When you say to the northeast, you mean there is a general slope in that direction?

A That's correct.

Q Let me draw that on the map. Now generally does that area identified by the No. 5 generally depict the area shown on your map?

A Yes, it does.

Q Now, do you know how far east from I guess it is Interurban Avenue, this non-included area extends?

A I believe it extends slightly further east than that depicted on the map, but, again, I cannot give you a precise boundary, but I believe it is a slightly larger area than you have illustrated in that Area 5.

Q Would it extend out as far as the L-1, area that's [29] zoned L-1 as depicted by this map?

A I believe it extends into—slightly into the M-P designated area, which is east of the L-1 parcel you have identified.

Q Would extend even further out into here; is that correct?

A Yes.

MR. BURNS: And I take it, counsel, you are not going to let him review his notes and materials and make the exact boundaries of these included areas available to me tomorrow when we continue this deposition?

MR. BARBER: We are not going to let you, in essence, get into our file through information that we are claiming work-product information on.

MR. BURNS: I don't want to look at the file. I want to ask the City of Renton what areas are covered by the Ordinance and what other areas are not.

MR. BARBER: Ask him the questions and he will respond.

MR. BURNS: He is telling me he can't respond, counsel.

MR. BARBER: You have got his testimony.

MR. BURNS: Okay.

[30] BY MR. BURNS:

Q Mr. Clemens, I have redrawn the non-covered portion to extend into the M-P area and marked it with a letter B, does that approximate the non-covered area that you are generally aware of?

A Yes, that would be approximately my best recollection at this time.

Q So we are clear, we have talked about five areas, we have specifically discussed Areas 2, 3, 4, and 5 and it is your testimony that Area 2 is generally not available, so Areas 3, 4, and 5 as we have discussed are the areas of the City of Renton where Ordinance No. 3526 does not apply and in which an adult motion picture theater could be potentially located; is that your testimony?

A The testimony was that the areas that you have depicted depict the areas on the map contained within my affidavit. The areas that you have designated as, I believe it is 4, that area, that's correct, in all probability is within the area restrictions of Ordinance 3526.

Q What do you mean, it is within the area of restrictions? You mean you could not locate an adult theater there?

A That's correct.

[31] Q So the area designated by the 4, you could not locate an adult theater; is that right, is that what you are telling me today?

A I believe that's correct.

Q So we can eliminate the whole Longacre site; is that a fair statement of your testimony?

A Yes.

Q So let me ask about area No. 3. Is that available to locate an adult motion picture theater?

A It would be available if the plat currently before the City of Renton is recorded. In the present undivided nature of the parcel, I believe it would not be available.

Q How about this potential area No. 6 that we identified, would that be available or unavailable?

A To the best of my recollection, I believe that there is a parcel within that area, but I cannot tell you precisely.

Q Now, Area No. 5, this area to the south down here that we have talked about, is that area generally available?

A Substantial portions of that area are available. There are parcels of property within that area which would not be available.

Q Perhaps you could describe for me generally those [32] areas within No. 5 which are not available. And I will try to mark them on the map as we go.

A I don't recall—I don't recollect precisely, but I believe the parcels in question are the parcels at the perimeter in particular of the northeast.

Q When you say northeast, you're talking about where, generally here?

A Generally in those—generally in the northern half of the area that you just swept.

Q In the northern half of this area.

A Correct.

Q You mean the lines should be up a little closer or are you saying the lines should go like this?

A The line—the line of actual area would be more southerly and westerly from that line.

Q And by "that line" we are talking about this slanted line?

A That's correct.

Q Would be more to the south, this direction, and more to the west?

A That's correct.

Q Now, I am going to, just for the purpose of trying to map these out, if I did it like this, would that be approximately? I don't want a map—Counsel, can he come over to draw on the map just to ease this [33] whole thing rather than me guess where he is talking about?

MR. BARBER: I object to that.

BY MR. BURNS:

Q Well, why don't you—let's go through it this way then, Mr. Clemens. Is that the approximate line you would draw?

A My recollection is that the line runs generally in a north-south direction in the area in the vicinity of the symbol M-P. Extends southerly and then extends easterly approximately at the point of the line that you had previously drawn and illustrated with a crosshatching.

Q I didn't understand that. Could you point out to me without drawing on my map which area you're talking about?

A If you start at the M-P symbol.

Q Right here.

A And extend southerly to the crosshatched area, that would be approximately the area that would be deleted.

Q Start from the center of the M-P or out by the P or out by the M?

A I don't recall precisely. I would say probably somewhere in the middle.

Q Let me go from the middle down to here. Now you're [34] saying that from that portion to the—would this square be the excluded part?

A No. I believe the exclusion is east of that line.

Q So this triangular piece in here; is that right?

A To the best of my recollection.

Q Now let me outline that in black and we will give it a number, or letter. I have outlined it in black and labeled it with a C in black. Is that generally the area that you were talking about?

A Generally speaking.

Q Are there other areas within 5 which are not available for location for an adult theater?

A I believe if you create another area extending westerly from the M-P designation and extending westerly to the separation, the line separating the M-P and H-1 zoned area and exclude the area to the north, that would be another area of exclusion.

Q Let me just go through it here. If I drew a line like this, the area to the north would be excluded?

A I believe the line would be higher than that, but that for illustrative purposes that's probably close enough.

Q If I started approximately here, would that be an appropriate place to start?

A I can't precisely tell you the exact location, but [35] generally in that vicinity.

Q And I drew it parallel or due west over the—to the line that separates the M-P from the H?

A Yes.

Q And then I go north and create another triangular piece of property?

A That's correct.

Q And that's as I have marked it in black and given the symbol D, is that the area that you were generally describing?

A Yes.

Q And that area is also not available.

A An area generally of that illustrative shape, yes.

Q Are there any other areas within the area generally marked 5 which is not available?

A The parcels that are fronting on Southwest 43rd which is the southerly city limit line probably are not available. I do not recall precisely which of those would not apply. I believe that it extended from the railroad tracks westerly—I am sorry, easterly to include the areas designated on the map as the exclusion that we have already illustrated plus the area that extends up to the middle line between the two H-1 illustrations on the map.

Q Let me see if I have you right. You're saying that [36] the area up to this line, is that what you are talking about?

A Between—east of the railroad tracks which are designated by the dash line.

Q Approximately right here over to a point approximately right here and south to Southwest 43rd?

A Yes, an area of approximately that area.

Q Let me draw that on the map and we will give that a label. That's an area that starts at this point right here, you see where I am?

A Yes.

Q And it runs over to approximately this point?

A Yes.

Q And then south down to 43rd to the intersection—intersected with the point that we have already identified with a B; is that right?

A Yes. That's to the best of my recollection.

Q And let's call that Area E. Are there any other areas within the area generally numbered 5 which are not available?

A To the best of my recollection, that's approximately the areas remaining.

Q Now, does the City of Renton own any property over here in the M-P area that I am pointing to on the far [37] westerly portion of this property?

A Other than city street right-of-way, I am unaware of any property ownerships of the City.

Q If it's determined the City owns any property over there, do you have any knowledge of whether or not the City would make that property available for adult theater use?

A If the City had property in that area?

Q Yes.

MR. BARBER: If you know.

MR. BURNS: That's all I asked him.

A I don't know what the Council's determination on that would be.

BY MR. BURNS:

Q Would that be an area that you would get into in terms of your policy development and so on?

A It is possible. We would normally be involved in recommendations to the Mayor and Council on use of public property.

Q If it turned out you were asked for a recommendation, what would your recommendation be?

MR. BARBER: Objection; calls for speculation.

MR. BURNS: You can answer it.

A I would think that as the most appropriate land use [38] for the area that we would not be in favor of use other than an industrial use in that zoning.

BY MR. BURNS:

Q Mr. Clemens, in your affidavit dated January 27, you indicated that as illustrated on the attached map of the City of Renton, there is approximately 400 acres of Renton within which the City—within the City of land which does not fall within the locational regulations. Do you recall that statement?

A Yes, I do.

Q Now, for our purposes, I believe the Court has, at least preliminarily, concluded, and I want you to make

the assumption, this property identified in the Boeing site is not available. You know the site I am referring to?

A Yes.

Q I want you to—further you have told me that the area No. 2 is not available.

A Not in its entirety.

Q But we have relabeled it No. 6.

A I'm sorry.

Q The area that has a potential is No. 6 now, isn't that right?

A To the best of my recollection.

Q And we know that—you have told me today that [39] generally the area identified with No. 4 is not available; you have also told me the significant areas of Area 5 are not available. Have you had an opportunity to recalculate the available acreage of the City of Renton which does not fall within the locational regulations?

A No.

MR. BARBER: I object to the form of that question. You may answer.

A No, we have not recalculated.

BY MR. BURNS:

Q Do you have an estimate based upon your best guess having prepared—not based upon your best guess, but based upon having prepared the original acreage calculation and having included in your affidavit of what percentage of that original 400 acres you are not excluding?

A It would most certainly be more than half. I cannot give you a more accurate number than that.

Q So you are excluding more than half of the 400 acres now.

A That's—

MR. BARBER: Objection; asked and answered.

BY MR. BURNS:

Q So we are talking about an area that is something [40] less than 200 acres available to locate an adult theater.

A Yes.

Q Mr. Clemens, are you generally familiar with the legislative history of the Ordinance No. 3526?

A Yes.

Q Did you participate in the legislative process throughout its occurrence?

MR. BARBER: I object to the form of the question. You can answer, if you can.

A By participate, you mean was my office in the discussions that occurred surrounding the Ordinance?

BY MR. BURNS:

Q Yes.

A Yes, we were.

Q Were you present at the City Council meeting on June 23, 1980 wherein the Renton City Council undertook to study the subject of adult bookstores, films and novelty shops by referring the matter to the planning and development committee of the City Council?

A What date was that?

Q June 23, 1980.

A I do not believe that I was present at that Council meeting.

Q You are aware, are you not, that this matter—the [41] Ordinance was referred to the chairman of the planning commission for study, are you not?

A Yes, I am.

Q And that matter was referred back to the City Council without study, was it not?

MR. BARBER: I object to the form of the question. Lacks foundation.

A The commission did review the question, and my recollection is that they responded to the Council that

they had other more pressing issues that needed resolution.

BY MR. BURNS:

Q Is there any record that we have here other than those documents that you have given me that would reflect the study that the planning commission gave this Ordinance?

A I believe the documentation provided includes planning commission minutes on the subject.

Q Now, the development and planning committee held public hearings on this matter, did it not, on the matter of Ordinance No. 3526?

A No, sir, I believe that they were public meetings.

Q Did I make a distinction?

A Yes. The distinction is that a public hearing would require legal notice posting and a public meeting [42] does not.

Q Okay. So they had what you refer to as public meetings.

A That's correct.

Q And no notice is required to be given of those.

A That's correct.

Q And were you in attendance at the public meetings that were held by the planning and development committee?

A Subsequent to the action of the planning commission.

Q Now, they had a committee meeting scheduled for March 5, 1981, are you aware of that?

A Yes.

Q Did you attend that meeting?

A Yes, I did.

Q Is it true that the public did not respond to that meeting and it was continued or rescheduled?

MR. BARBER: I object to the form of that question.

A I believe March 5th was the meeting that we had extensive testimony.

BY MR. BURNS:

Q Excuse me. Excuse me. On February 9. Was there a meeting of the planning—just a second here—let's go back a little bit.

[43] Do you recall when the meetings of the planning development committee were scheduled relative to that Ordinance?

A No, sir, I don't have that at my fingertips. Although there were several meetings.

Q Do you recall that on—at the Council meeting on or did you attend the Council meeting on February 9, 1981?

A I don't recall whether I did or not.

Q Do you recall that there was a planning development committee meeting relative to this Ordinance that had to be rescheduled because the public did not respond to the notices?

A Yes.

Q And how many meetings were held by the planning and development committee relative to this Ordinance?

A I can't say precisely. My recollection is incomplete, but I would say in approximately six; there may have been more.

Q And how many of those meetings were public meetings?

A Every one.

Q Now, on March 5th, 1981, there was a public meeting, was there not, relative to this Ordinance?

A Yes, there was.

Q And there was public testimony at that meeting or [44] public comment at that meeting?

A Yes, there was.

Q And is that the only meeting where there was public comment about this Ordinance?

A No. There were several other meetings of the planning and development committee where members of the public did give testimony.

Q Is there any record by tape recording, videotape or minutes of those meetings of the planning and development committee which would describe or detail the comments made by the public relative to Ordinance No. 3526 or whatever it was called in its planning stages?

A Not to the best of my knowledge, there were no tapes or minutes.

Q Is there any record of the meeting of March 5, 1981?

A With the exception of notes which I originally took and I'm sure other members of the Council took at that time, there is no minutes or recordings that I am aware of.

Q Now, your notes and those of the Council are included within the documents that have been provided to me, is that true?

A My notes were removed from my file after several months after the Ordinance was adopted, since there [45] have been no action and my file was eliminated from our working file.

Q So we don't have your notes.

A No.

Q Do we have any notes that are included in these documents?

A I don't know. Apparently Mr. Kellogg's notes were—are included in the package.

Q Mr. Kellogg's notes, the City Attorneys notes?

A That's correct.

Q Do you have any independent recollection of what was said by various persons attending that meeting of March 5?

A Yes, I recollect the general testimony that was made and the testimony of several of the citizens is reasonably clear.

Q Do you have personal knowledge or can you identify the comments of any individual with the name of that individual today?

A The two that come to my mind are the superintendent of schools, Mr. Colvice, and I am not sure how you spell that, and Mr. K. Johnson, the director of the Greater Renton Chamber of Commerce.

Q Do you remember the names of any other individuals that were testifying that you can identify with their [46] specific comments?

A Not to the best of my recollection.

Q Did you know any of the other individuals that were testifying other than the school superintendent and Mr. Johnson?

A There may have been others that testified that I had either seen or come in contact with previously, but none that I can recall that I had any sort of a close knowledge of.

Q Is there any individual or any particular testimony that you can recall today that you at that time were aware that the individual had particular qualifications that made his testimony more than just a personal opinion?

MR. BARBER. I object to the form of the question.

MR. BURNS. You understand my question?

THE WITNESS: I believe so.

A The two people that I have indicated previously particularly stood out as individuals that did have expertise in the area that they were discussing.

BY MR. BURNS:

Q Do you recall anybody other than these two individuals?

A Not to the best of my recollection.

[47] Q Now, I recall that you testified about what these individuals said at the temporary restraining order hearing, but I don't happen to recall your testimony with regard to what they said. To the best of your recollection, can you recount for me what Mr. — the superintendent of schools said at that hearing?

A He was concerned about the impact of adult entertainment land uses on school education—the school education process and concerned about children walking or being in the vicinity of those types of land uses going and coming from school.

Q Did he express anything other than concern by way of factual material which would support the conclusions or concerns that he expressed?

A I don't recall any specific items of background that he provided other than his own opinion as an educator.

Q So to the best of your recollection, you recall the superintendent of schools offering an opinion, but you do not at this time recall any facts that he may have offered in support of that opinion.

MR. BARBER: Object to the form of the question.

A I believe that's correct.

BY MR. BURNS:

[48] Q Now, with respect to K. Johnson, the Renton Chamber of Commerce person, what in particular do you recall that he said? That is he rather than a she?

A It is a he. The comments that Mr. Johnson expressed were essentially twofold. The first was that adult entertainment land uses, I believe the term that he used was could, adversely affect business practices, property values within the City if allowed and he expressed secondarily that the City zoning regulations should be established to limit the location of those kinds of land uses.

Q Do you know what sort of business Mr. Johnson is engaged in?

A Other than being the manager of the Chamber of Commerce, I am not sure what his expertise or technical background is.

Q Did he identify any specific ways in which adult entertainment uses would adversely affect business practices or was that just a general conclusion that he stated?

A I believe that it was a general conclusion.

Q Do you recall any facts that he may have related at that meeting that would establish that adult entertainment uses could adversely affect business practices?

[49] A I don't recall at this time any specific facts that he related.

Q Do you recall any specific facts that he may have related which would substantiate his concern that adult entertainment uses could adversely affect property values?

A I don't recall any specific testimony.

Q Was there any specific testimony, to your recollection, by anyone at that hearing that offered facts in support of an opinion as to the effect of adult land uses or adult entertainment uses on the City of Renton or as they would affect the City of Renton?

A I don't recall at this time any such comments.

Q So you have no present recollection of any factual material offered at that public meeting; is that a fair statement of your testimony?

MR. BARBER: Objection; asked and answered.

A No, I don't recall any specific factual testimony.

BY MR. BURNS:

Q Is there anywhere where you know of where we could go today to determine if, in fact, there was any factual testimony offered, any document we could look at, anything that we could do to determine what had taken place at that meeting?

[50] A None that I am aware of. Could we break a second?

MR. BURNS: Sure.

(Short recess taken)

BY MR. BURNS:

Q Am I correct, Mr. Clemens, in stating that this Ordinance No. 3526 was considered by the City Council on April 13, 1981?

A If I could review the minutes, I could probably affirm that.

Yes, based upon the minutes presented, it appears the Ordinance was read for the second time and adopted on that night.

Q Now, when it says read for a second time, does that mean it was read for a first time sometime?

A There would have been a prior time that the Ordinance was read the first time.

Q Now, when it is passed, did you attend that meeting when it was passed?

A I don't believe I was at the meeting where the adoption took place.

Q Have you made any effort to identify the owners of the properties that are identified by No. 3 and generally the area No. 5?

A We have made no specialized effort to evaluate property ownerships. We are aware that the major [51] property owners in—who the major property owners are in those areas.

Q Who are the major property owners in the area No. 3?

A I believe there is a contract sale on that property from First City Equities Company to Holvick, H-O-L-V-I-C-K deReg, small d-e-R-E-G, and K-O-E-R-O-N-G, it is a Sunnyvale, California industrial park developer. The area generally designated as No. 5, the largest property owner in that area would be Burlington Northern Railroad Company, although it might be the title of Glacier Park Company, which is their land people.

Q Are there other major owners down in this area No. 5, in the Benaroya Business Park and the Cole Business Center?

A Yes.

Q Are you aware of any other property owners down in that area?

A I am certain there are others, particularly the smaller parcels along the West Valley Road adjacent to the westerly boundaries of the City.

Q Do you know generally who owns the area No. 6?

A I believe that is Burlington Northern, although it may have been transferred to some other entity.

Q Now you indicated in prior testimony that something [52] is going on with area No. 3, that there is a plat in process?

A Yes, that's correct.

Q And until that plat is approved, area No. 3 is not available; is that right?

A That's correct.

Q And so if this litigation were resolved today and if somebody applied for a permit to put an adult theater in the area No. 3 today, they could not do so.

A That's correct.

Q Through this area marked No. 5, there is a drainage ditch that runs through there, isn't there?

A That's correct.

Q Are there any special requirements or limitations about building around, near, over or across that drainage ditch?

A The City has two regulations that would apply: first, is the city storm drainage ordinance, I am not sure that's the precise title, which would apply to any properties within the City of Renton but particularly areas adjacent to designated flood ways and flood way fringes, certain regulations apply.

Q This is a flood plain ordinance you and I have spoken about generally; is that right?

A Yes, that's correct.

[53] Q And that requires execution of a waiver against the City prior to building.

A That's a separate requirement.

Q Okay.

A The flood way ordinance is—has been—ordinance in the regulations are spelled out in the City code. The resolution that you were speaking to was a separate action of the City Council relative to a finding by the Federal Emergency Management Administration that

concluded that their earliest flood hazard analysis in the City's areas designated as Green River Valley comprehensive plan area may have been incorrect.

Q What under this storm drainage ordinance, what are the general requirements then for building in this entire area?

A The requirements under the ordinance are that the finished floor elevation of any structure be above the designated flood elevation.

Q Has the flood elevation been designated?

A The FEMA and federal agency analysis has been completed and, as I noted, they found some difficulties with the original analysis. As a part of the Council's resolution requiring a disclaimer to be signed by properties developing within the valley [54] area, they also instructed the administration to develop interim regulations. The existing interim regulation would be one foot above the FEMA flood elevations.

Q So I could build today or—the FEMA flood elevations are in existence; is that correct?

A That's correct?

Q So if somebody wanted to build down there today, they would have to build a finished floor level one foot above the FEMA elevation; is that correct?

A That's correct. That is correct.

Q They would also have to execute the waiver required by Resolution 2421?

A That is correct.

Q Are there any other requirements or restrictions in that area that apply particularly to setbacks from that drainage ditch or building across it or doing whatever within an area near the drainage ditch?

A The flood hazard ordinance requirements would not allow any construction that would restrict the flood way or to reduce the available flood storage that's described in the flood fringe.

Q What does that mean, in layman's terms?

A In layman's terms, if you put down one acre foot of fill in order to get your floor elevation up to the [55]

required minimum, you would have to remove one acre foot of material from that area, if you were located within the flood fringe.

Q I guess—I don't understand you. You say if I put down one acre foot, I have to take away one acre foot?

A That's correct.

Q Where do I take it from?

A From the original site area.

Q How can I put and take away at the same time?

A Okay. What you would be required to do is excavate from the remainder of the parcel of the property that is not under the building the amount of fill which you import to the site to get your floor elevation up to the required level. Alternatively, you could build a structure on pilings so the flood area underneath would not be restricted.

Q Okay. So I think I understand now. So in order to build, I have to create a mound, taking the dirt from around the property site and putting it underneath my floor or I can build on pilings and not do anything, as long as my finished floor elevation is one foot above this FEMA level.

A That's correct.

Q Now, in particular, if I own a parcel of property [56] which—down in this southern area, which includes this drainage ditch, what can I do with regard to that drainage ditch? Can I build over it, can I build up to it? Those are two questions, but let's start with can I build over it?

A I believe that if the—as long as the flood way itself, which is, at least currently, is defined as being within the banks of the Springbrook Creek, as long as that is not disturbed by the construction, it may be possible to build over it. Now, I believe, although I am not positive, that the right-of-way for that creek is owned by Drainage District No. 1 of King County. In that case, I doubt that you would be constructing over it, but presumably it could be possible.

Q Now, I am showing you what is a marked-up copy of the Renton Urban Area Comprehensive Plan. Are you familiar with this map and drawing and things?

A Yes, I am.

Q Down here there is—there is and I am pointing to a green line which represents the drainage ditch which runs through area No. 5, am I not?

A Yes, you are.

Q Now with respect to this drainage ditch, you're telling me that a right-of-way is owned by Drainage [57] District No. 1?

A I believe that's the case.

Q Do you know how wide that right-of-way is?

A To the best of my recollection, I believe it is 40 feet.

Q 40 feet, so would be 20 feet on either side of the midline of the ditch or 40 feet on both sides?

A 40 feet total.

Q So for practical purposes, there is a 40-foot swath cut by this drainage ditch which is not available for building, is that accurate?

MR. BARBER: Object to the form of the question. I think it also misstates the testimony of the witness.

BY MR. BURNS:

Q Did you understand my question?

A If the question is is it available, does it comply with the Ordinance, the answer is yes.

Q That was not my question. As a practical matter, there is a 40-foot swath through here that somebody has a right-of-way, the drainage ditch people, for running their drainage ditch and that as a practical matter is not available; is that correct?

A I believe it would be technically feasible to construct over it if you could get permission from [58] the drainage district to use the property.

Q But in your opinion, you probly aren't going to get that opinion or that permission; that's what you said before, isn't it?

A I don't recall that I made any remarks about the drainage district's—desirability of doing.

Q The comprehensive plan map that I am showing you shows this tentatively, I think, as greenbelt, does it not, on the comprehensive plan?

A That's correct.

Q Is that currently in effect as greenbelt, this 40—strike that.

Is the area designated as greenbelt, is that the 40-foot swath or is it something greater than the 40-foot swath?

A It would be generally the area contained within the existing 40 feet.

Q Is that currently zoned or set aside for this greenbelt by the regulations of the City of Renton?

A No. I believe the zoning as indicated on the map is a variety of industrial zones, industrial and business zones.

Q What is the effect of this comprehensive plan for the purposes of future zoning?

A The comprehensive plan would be taken into [59] consideration at the time of rezoning of property to consider whether property should be left in its natural state, particularly in this case along the Springbrook Creek, and the case of the area No. 5, all of the zoning currently exists and the comprehensive plan would have little affect until we got to the plan review stage.

Q Now, would you be the person who would be the—involved in making those kind of decisions as to whether a prepared use in this area was consistent with your comprehensive plan?

A Yes.

Q Now, let's assume that this property is zoned where this swath grows through, is zoned H-1—I think part of it is within the H-1 area or may be it is all in the M-P area. If somebody came in with a use that was an ap-

propriate use for a M-P zone and wanted to locate within this 40-foot swath, and assuming they were able to get the permission of the drainage ditch to do that, what would be the position of the City of Renton?

MR. BARBER: Object to the form of the question.

MR. BURNS: Let me go back again.

BY MR. BURNS:

[60] Q Making those assumptions, would the City of Renton have the power to veto or would the plans of the developer be subject to an approval of the City of Renton?

A Yes.

Q And would that come before you for consideration?

A In part.

Q And you are the head of the policy development department which makes these comprehensive plan decisions, is that not correct?

A That's correct.

Q If that happened, what would be the position of your policy development department and what would be your recommendation as policy development director?

MR. BARBER: Object on the ground calls for speculation.

MR. BURNS: You can answer.

A I believe that our recommendation would be that the area that is physically the existing Springbrook Creek should be left in its natural state and the development be located outside of that immediate area.

BY MR. BURNS:

Q And by outside of that immediate area, do you mean outside the 40-foot right-of-way?

A At a minimum.

[61] Q If I wanted to locate anywhere else in the, say, the M-P area, let's just take it for an example, and I have a use that's permitted in the M-P zone, does your department or any department of the City of Renton have

any discretionary right to review the use that I want to put that property to?

A Not the use.

Q What kind of discretionary review exists that the City does have?

A Under the requirements of the M-P district, there is a site plan review requirement before the land use hearing examiner. That review would be a review of the physical structure, its siting on the property, requirements of parking and other minimum ordinance standards.

Q But those are objective criteria, are they not, that—let me go back and ask. Are those objective criteria set forth in the Ordinance?

A The building envelope is an objective criteria.

Q What do you mean by building envelope?

A That would be the area remaining on the property after you subtract the setbacks and height limitations.

Q So there are objective criteria that says I can put this many square feet and I have to have this many [62] parking stalls and I have to have this kind of construction and those kind of wires and things like that?

A That's correct.

Q Is there any discretionary review that the criteria may not be set forth in such objective standards?

A The criteria on the precise location of the building within the building envelope that I have described is more subject analysis. There may be other circumstances that would warrant locating the structure at a different point within the building envelope than proposed by the property owner.

Q So I can come to you with a site plan for my parcel of property and I can say I want my building here and you can say no, if you are going to build it you have to put it over here, as long as it is within the setbacks and the other kinds of things?

A Yes, the City would have that authority.

Q Now, that includes the M-P zone. Would that also be true for the H-1 zone?

A No.

Q So in the H-1—M-P zone, the City has discretionary authority about building location on the site.

A That's correct.

Q And no other discretionary authority.

[63] A Not to the best of my recollection.

Q Now in the H-1 zone, did I understand your testimony to be that the City has no discretionary authority if the use is an appropriate use for an H-1 zone?

A If it meets the Ordinance—the specified Ordinance standard for setback, parking, height and so on, there is no discretion.

Q Now, area No. 3 would be within that M-P zone; is that correct?

A That's correct.

Q Area No. 6, what zoning would that be, do you think, or can you tell from this map what zoning that is? Looks like it may be G.

A We've done a rezone analysis and that L-1 zoning classification that's slightly to the southwest may include that parcel. I don't recall precisely, but assuming that it was L-1 there would be no ability to modify a plan that was in conformance with the standards of the Ordinance.

Q How about in the G zone, assuming this may extend down into the G zone.

A If that's the G zoning classification, that would be a large lot, single family zoning classification and the standards again would be minimum standard requirements. No discretion.

[64] Q Would an adult theater use be permitted in a G zone?

A No.

Q So if in fact Area 6 is G, there would be—adult theater could not locate there?

A If it was in fact G at the time of the application, it could not.

Q Looks like we may have an area over here that is zoned B-P?

A Yes.

Q Is there any discretion allowed in a B-P zone?

A The only use allowed in a B-P zone is parking, but, again, there is no discretion. If the use was parking, and it met the code requirements, it would be allowed.

Q Now, with respect to this area that is identified then as B-P, would—could an adult theater locate there?

A Within the B-P zone, no.

Q So there is an area—this looks like a very slender rectangular piece of property that is within the B-P zone. Is that—that is the B-P zone and looks like it does not extend over to here or is that right or is that how you would look at that?

A I believe that it is one contiguous parcel, that is zoned a combination of B-P and H-1. The portion that [65] is designated B-P could not be used for an adult theater; however, the parking for an adult theater could be located within the B-P zone and the theater located on the portions zoned H-1.

Q Is that—okay. So you could use that for parking, but couldn't put the physical building?

A That's correct.

Q Within the Renton city codes, are there any provisions which relate exclusively to the dimensions, size and other building requirements of a motion picture theater?

A Not within the City Zoning Ordinance. There may be minimum code requirements that relate to the building code as far as the minimum dimensions, but as far as the zoning regulations are concerned, I am not aware of any.

Q Now, I believe that you were designated to testify about building code matters. Do you have any knowledge of the building code of the City of Renton relative to what requirements, if any, exist for the construction of a motion picture theater?

A Not building code itself, no.

Q Would Mr. Nelson have that information?

A Yes, he would.

Q Do you have general knowledge with respect to the [66] parking, setback and land area and landscaping requirements for a motion picture theater as opposed to other uses that may exist in the various zones where an adult motion picture theater would be located?

A Yes, I do.

Q Do those restrictions generally relate to motion picture theaters wherever they are located as opposed to a distinction between adult motion picture theaters in these particular areas and a general release motion picture theater that may be located elsewhere?

A I am not aware of any distinction, other than the locational criteria for adult theaters.

Q So absent the locational criteria for adult theaters, there is one set of rules that would apply to regular theaters or general or adult motion picture theaters if you were going to construct them?

A That's correct.

Q In other words, if I went into, say, the B business district, wherever it is, up there, and I were to build a general release motion picture theater, the parking requirements would be the same there as they would be, say, down in the M-P area?

A That's correct.

[67] Q With respect to capacities, if I were to build within the corporate limits of the City of Renton a motion picture theater designed to accommodate 400 patrons, would there be any minimum size requirements?

A Not as it relates to the zoning regulations.

Q I am talking about the building regulations.

A I can't speak to that specifically.

Q So you don't know what the building restrictions are; that you have so many square feet per number of people.

A No, I don't.

Q If I were to build a motion picture theater that were to have a capacity for 400 people, are you aware of—are there any parking requirements—

A Yes, there are.

Q —that I would have to provide?

A Yes, there are.

Q What are the parking requirements?

A City's parking requirements for theaters would be one parking space for each four fixed seats or one parking space for each 100 square feet of floor area where there are no fixed seats.

Q Is there a minimum size parking space?

A The minimum standards on parking stalls is 9 x 20 for standard vehicle and eight—I am sorry. I believe [68] it is 9 x 16 for compact vehicles and you can have 25 percent of the parking space in compact spaces.

Q 9 x 20 standard, 9 x 16 compact?

A I believe that's correct. Either nine or eight. I don't have it on the tip of my tongue. Would you like me to review that specifically?

Q Well, yeah. Mr. Clemens, maybe I can cut through all of this a little bit. And what I am postulating is a theater of—that has a building area of approximately 6,000 square feet that contains approximately 400 seats, has a concessionaire that you would generally find in any conventional motion picture theater, has a projection booth and has restrooms for ladies and gentlemen and was built according to code as opposed to wheelchair slots and all the kinds of things that are needed according to current building codes, and my question, when I get right down to the bottom line, is how much area am I going to need in a M-P zone or a H-1 zone or a L-1 zone in order to put that theater on that site assuming setbacks and assuming all the other things that you have in your standard ordinary requirements?

A Would you give me the seating again, please?

Q 400 seats.

[69] A 400 seats.

Q A building size of approximately 100 x 60 or 6,000 square feet would probably accommodate that use.

A Okay.

Q Do you understand my question and what I want to know?

A Yes, I can give you a rough estimate.

Q Okay.

A The seating—the parking requirement for 400 seats would be one per four seats which would be 100 parking spaces. And as a rule of thumb that we use when we are just postulating, we would use 400 square feet of site area to accommodate each parking space, that would be both the space itself and the aisles necessary to get in and out. So assuming 100 spaces, and 400 square feet, that would require approximately 40,000 square feet plus the building, which would come to 46,000 square feet, and assuming ten percent error factor on top of that for necessary setbacks, landscaping, I would say probably between 50,000 and 52,000 square feet of site area. Depending on its configuration and other factors that may not be known.

Q Are the setback requirements the same in the M-P zone as in the L-1 zone?

[70] A No, they are not.

Q You have given a benchmark here of 50,000 to 52,000 square feet roughly. Would—now, in which zone would that apply?

A That would apply in the B-1 zone, on up through our zoning classifications, so that would be the B-1, L-1, H-1 and M-P.

Q Now, aren't there more stringent setback and landscaping requirements in the M-P zone as opposed to the H-1 zone?

A I believe the landscaping requirements may be slightly more restrictive. The setback requirements are essentially the same. The building setback requirements between the M-P and H-1.

Q Does there have to be any buffer zone in any of these zones that would have to be provided for between your use of the property and the adjoining properties?

A With the exception of the M-P zone, if there was a determination that an alternate location within the building envelope was appropriate, there might be a requirement for landscaping separating one use from another, but there is no specific requirement in any of the zones for buffers between uses.

Q And the buffer zone would only be applicable in the M-P zone?

[71] A If appropriate.

Q And could the parking areas, the parking area that you are providing, generally calculated in terms of—included in your setbacks?

A Yes. The 400 square feet per space and plus the ten percent for fudge factor would include all of the requirements that would typically apply.

Q So I can park right up to the edge of my property line.

A In some zones there is a minimum setback from the street right-of-way—I'm sorry. In all zones there is a minimum of five-foot setback, landscape setback from a public street to a parking lot. In the M-P and I believe the H-1 zone there is a ten-foot landscape setback requirement.

Q Is that from the streets?

A From the street property line.

Q Not from sideline boundaries or rear boundaries?

A No.

Q So I could do nothing there except put in landscaping.

A That's correct.

Q Now, the 50,000 to 52,000 foot figure that you gave me generally related or generally would have included the setback requirements?

[72] A Yes.

Q So if I am going out to look for properties in these areas and I want to build a 6,000 square foot building with 400 seats, I know I am going to need—I have to find an acre and a quarter somewhere, roughly?

A Approximately.

Q Can we go off the record for a minute?

(Discussion off the record)

BY MR. BURNS:

Q Mr. Clemens, the zoning classification, the particular zoning use for adult motion picture theater did not exist prior to the enactment of 3526 within the City of Renton, did it?

A No.

Q So it is a new use classification, is it not, that was created by this Ordinance?

A It is a distinction between two types of motion picture theaters.

Q And that distinction did not exist prior to enactment of the Ordinance, did it?

A That's correct.

Q I take it that it is from documents that have been filed by the City's attorneys that they are contending that the use for an adult motion picture [73] theater is a permitted use within the B-1 zone; are you familiar with that contention?

A Yes, I am.

Q Now, I have reviewed your zoning code and I believe that Section 4-711 sets forth the uses that are allowed in the B-1 zone, does it not?

A Yes, it does.

Q Could you direct me where in that section you find that an adult motion picture theater is a permitted use within the B-1 business district?

A It is not specifically set forth; however, the City has interpreted, since long prior to my coming to the City, that commencing with B-1 district, a theater use

and many other uses that are not specifically set forth in the B-1 district are allowed as being uses similar to the uses specified in the B-1 district.

Q So it is not specifically set forth, you acknowledge that; that a theater use nor an adult theater use is particularly set forth as a permitted use in the B-1 business district?

A No, it is not.

Q Under which of these many classifications, if any, do you fit those uses or is it some other policy that has created an unwritten use?

A The City in its interpretation requirements looks [74] at the district as a whole to establish the types of uses that are allowed, and in taking the district as a whole, the City, by past practice, has established that theaters, motels and hotels, which are not specified within the zoning particularly, are uses which are allowed in the zoning classification as being similar to the whole array of uses that are established in the—that section of the code.

Q So I take it from your testimony that you do not contend that a theater use or adult theater use falls within any of the delineated classifications under Section 4-711 but rather by way of past practice and general character of the City has administratively determined it is an appropriate use for that classification?

A That's correct.

Q Now, is there any policy or statement or writing which sets forth this determination by the City that, first, theaters are permitted within the B-1 zone?

A I am not aware of any such written determination.

Q In your capacity as assistant planner or associate planner, senior planner, acting planning director, now policy development director, if such a writing existed, would you be aware of it generally speaking?

A I would think so.

[75] Q Is there any writing that exists by the City of Renton or any policy that is set forth in writing that

sets forth that an adult motion picture theater is a permitted use within the B-1 zone?

A I am not aware of any such written statement.

Q So if I were to come to town and look at your zoning code, it would not tell me on its face and there is no writing that I could ask for that would tell me that a theater or an adult motion picture theater was a permitted use in the B-1 zone; is that correct?

MR. BARBER: Objection, asked and answered.

BY MR. BURNS:

Q Is that correct?

A The—there would be no written document that we could hand you; however, if you requested an interpretation in writing from us, we would answer affirmatively to both the theater use and adult motion picture theater use with the exclusion of the locational criteria for an adult motion picture theater.

Q We are understanding each other just fine.

Now, I want you to assume for the purposes of the next series of questions that I am going to ask you that the City has not made that determination; that a motion picture theater is a [76] permitted use in the B-1 zone. If a motion picture theater wanted—and I take it from reviewing the criteria also for a M-P zone, that a motion picture theater or an adult motion picture theater is not a permitted use in writing, included within the designated permitted uses, is it?

A The M-P zone.

Q Yes.

A That is correct, sir.

Q And the answer would be the same for the L-1 zone?

A Yes.

Q And for the H-1 zone?

A Yes.

Q And the reason I take it that you indicate that those uses are included within the zones is by reason of

the fact that any use that's permitted in a B-1 zone is also permitted in these zones.

A That's correct.

Q Now, assuming for the purposes of my next series of questions that the theater or adult motion picture theater is not a permitted use in the B-1 zone, what would be the proper zoning procedure to get or to use a parcel of property located in a M-P zone as a theater; would that be by special permit, conditional use or variance?

[77] MR. BARBER: Object to the form of the question.

MR. BURNS: Do you understand my question?

A Yes. If a person desired to construct any type of motion picture theater within the M-P zone, the criteria would be application to the City for site plan approval within the allowed uses in the M-P zone district.

BY MR. BURNS:

Q Now, if a motion picture theater use were not an allowed use because we have a dispute as to whether it is an allowed use or not and I want you to assume it is not an allowed use—

A Okay.

Q —would, in order to build that building or structure or you develop it for that use as a theater or adult motion picture theater, would you be required to get a conditional use permit, a special permit or a variance?

MR. BARBER: Object to the form of this question also.

MR. BURNS: You understand it?

A Under the assumption that the use was not allowed within the district, I would think that the probable form would be a conditional use permit.

[78] BY MR. BURNS:

Q Now, who—and you make that assumption based upon your experience in these various capacities that you

have held in connection with zoning enforcement within the City of Renton; is that correct?

A Yes.

Q Now, if your assumption—who would overrule you as to your assumption as to the appropriate procedure?

A The appropriate procedure in a case where there is a dispute over whether a use is or is not allowed is an appeal to the land use hearing examiner.

Q So if I came in and, for instance, let's assume that my client came to town and he wanted to build a theater in the M-P zone and he contended that he was allowed to build it there as a matter of right, assuming that he met the other criteria for that zone, and the City said no, you aren't, that's not an appropriate use for that zone, his remedy would be appeal to the land use hearing examiner; is that correct?

MR. BARBER: Object again to the form of the question. You may answer.

A The appeal would be to the examiner, that's correct.

BY MR. BURNS:

Q And what provisions of your zoning code govern that [79] appeal process?

A The entirety of the ordinance which is Chapter 30 of Title 4. It is a code that's outside of the zoning ordinance itself.

Q Do you have that here with you over there?

A Yes.

Q May I look at it?

MR. KELLOGG: Let's go off the record for a minute.

(Discussion off the record)?

A I believe the second section establishes the items that the examiner is empowered to consider. It is a whole list.

BY MR. BURNS:

Q Under "duties"?

A Yeah.

Q Now, in our assumed example here, we have a dispute as to whether a use is an appropriate use and my client has appealed to the City hearing examiner and he has had a hearing in conformity with the procedures set forth by your city code and the hearing examiner, in my example that we are going through, decides in favor of the City, that it is not an allowed use within that particular zone. Are you with me?

[80] A Yes.

Q Okay. My client still desires to proceed with his project and build a theater. What would be his next step in trying to accomplish that goal?

MR. BARBER: Object to the form; speculation and assumes facts not in evidence. Answer if you can.

A There are two possibilities: one is an appeal to Superior Court for a determination in Superior Court as to the correctness of the City's position. Alternately, I am going to have to review the conditional use section to see whether there is sufficient flexibility.

(Discussion off the record)

A I am not sure whether there would be any alternate approach within the City's code if the examiner concluded that it was not a permitted use. The—there is a possibility, depending on the specific circumstances what zone it is in, that a conditional use permit to allow a less restricted use in a more restricted district could be possible, but failing that, the only alternative would be to request the City Council to amend the ordinance to set forth that use specifically as permitted or conditional use.

BY MR. BURNS:

[81] Q I see or I find in your zone code three different kinds of possible avenues, one being the special permit, the conditional use or the variance. In your experience and based upon your position as the enforcement officer

for the zoning code, what is the purpose and use of the special permit as it applies to your zoning ordinance?

A The special permit provisions only apply to those uses that are specifically set out in the code as being permissible with a special permit.

Q Could you refer me to the section of your Ordinance that you're referring to?

A Would be 4-722, Paragraph B.

Q 4-722B talks about particular or gives the hearing examiner power to issue special permits for such uses. Which uses are those?

A Those would be uses specified elsewhere in the ordinance which particularly set forth that the standards to be used are a special permit approval. And there are numerous.

Q Can you identify—well, let's do it by elimination. Is a motion picture theater or an adult theater a use that is set forth anywhere in your Ordinance that would be subject to a special use permit?

[82] A Not to the best of my knowledge.

Q So the use of a special permit would not be applicable in any circumstances for a theater or adult motion picture theater?

MR. BARBER: Object to the form of the question.

A Not to the best of my knowledge.

BY MR. BURNS:

Q Now, what is the purpose of a conditional use permit?

A Conditional use permit is quite similar to a special permit in—at least in terms of its form. Although it does provide some additional latitude to allow uses that fit into more intensive district's, such as industrial districts can be moved down to less intensive districts, for instance a business district. If the nature of that specific use and its specific design is compatible with the more restrictive zoning classification.

Q And in the example that we were using, it was your testimony that this may be a possible approach in the event that it was determined that a theater use was not an appropriate use in the zone where I wanted to build it, where my client wanted to build it.

A Yes. The—it is possible under the section that I have just discussed to apply under that provision to [83] move, say, a use allowed in a light industrial zone down to a B-1 zone based upon its specific design. And if your contention is it is not specified anywhere in the code, I am not sure that section would apply. I would have to think about it.

Q Okay. So if I understand what you're telling me, that's really moving a specified use, the conditional use permit is used for moving a specified use from one zone to a less intensive zone.

A Less intensive but more restrictive.

Q Okay. Now, what is the use of the variance as that term is used in your zoning code?

A The variance is intended to provide for the modification of specified standards. It is not appropriate for modifying use. Variance is—there is no variance to a use. But there are variances to specified standards within the Ordinance such as height, setback, parking requirements and so on.

Q In your experience as an enforcer of the zoning code of the City of Renton, have you ever come upon occasions where somebody has wanted to put in a use or put a property to a use that was not covered by your zoning code?

A Yes.

Q And what procedures did you follow in arriving at an [84] administrative determination as to whether—as to what you do?

A What we have requested in every case that I am aware of is a letter from the proponent illustrating what the use is that they are intending, trying to give us as much detail as possible as to its nature, character extent,

and we compare that to all of the standards applicable to each zoning classification. Once we have determined whether a use fits or doesn't fit, within a particular zone, we respond in writing as to our conclusion and indicate whether we either found that it was appropriate or inappropriate. And establish that if they—if the proponent found the use or our determination inappropriate in their case, that they do have appeal rights to the hearing examiner for consideration.

Q In all those instances, did you designate to them which zone their intended use would be appropriate?

A To the best of my knowledge.

Q Or—well, in the context of those cases that you have worked on of that nature, have they requested the use be in a particular area?

A Let me give you an example.

Q Okay.

A Typical case is a machine shop. Machine shops—now [85] maybe that's not a perfect example, but it is close enough. Machine shop in a business zone. Typically a machine shop would not be appropriate in a business zone. It is basically a light industrial use. The applicant may be able to provide us with specific information about the nature of this machine shop that it is of such a scale that it is appropriate in the B-1 zone, very little in the way of mechanical equipment and it does not fit in the L-1 zone but appropriate in a B-1 zone and we would so indicate. On the other hand, we might conclude that no, the use you propose based upon the description that you have given us is still a light industrial use and should be located in a light industrial zone.

Q In the example you have given, is a machine shop use a use that's not covered anywhere in your zoning code?

A I was trying to recall after I gave it as an example. No, it is not specifically set forth, although there is a section that would be somewhat analogous in a light manufacturing use, using power of specified quantity.

Q In terms of making these decisions, are—when a use is not a specified use, is there—are there any written criteria, any objective guidelines that you go upon—that you rely upon to make your decision [86] or do you rely upon an evaluation, a subjective evaluation of the contemplated use and the surrounding businesses?

A Primarily the criteria that we would look at is the similarity to similar uses in the code that are specified in the code and good professional judgment. That's what we are trained for and paid to do.

Q And when you say good professional judgment, what factors are you applying?

A Typical health, safety and welfare concepts, the general intensity of the use, principle that would suggest whether a use does or doesn't affect adjoining uses, so on. Noise as an example.

Q Are the procedures for obtaining a conditional use permit those that are contained within this Chapter 30 or Section 30 of Chapter 4?

A I believe the standards for application—it is a combination of Section 4-722 capital letter F, and Chapter 30 of Title 4. We have prepared written procedures that we would make available to any applicant for a conditional use permit.

Q What are these written procedures that you have, what do they consist of?

A They would specify the number of copies of the application, affidavits of ownership, number of [87] copies of plans and what those plans should consist of.

Q Are there any written criteria or objective standards that are used or applied by the hearing examiner in reaching his decision that are contained anywhere other than in the words of the Ordinance in 720—4-722(F) and in Chapter 30 of or Section 30 of Chapter 4?

A The—in addition to the criteria specified in both of those locations, the City's comprehensive plan documents would also apply as outgrowths of sections already specified here in the Ordinance itself.

Q In particular, which sections of the comprehensive plan?

A The comprehensive plan consists of a number of elements. The land use plan is the map which you have previously discussed here today. There is language setting forth goals and policies which were adopted originally in 1965 and supplemented in 1980, which would be utilized by the examiner in his review. Depending on the specific type of use, he might also review utility or transportation sections of the comprehensive plan.

Q In particular, if we had—if the hearing examiner was considering a conditional use permit application [88] relative to a motion picture theater or an adult motion picture theater, can you tell me which portions of the comprehensive plan would be applicable?

A The—under the assumption that a conditional use permit application would be required, I would assume that he would primarily look to the adopted policies of the comprehensive plan, those are broken into somewhere between 12 and 15 sections dealing with everything from residential uses to the environment and a number of other issues. I would think that the policies element of the document would be where he would seek guidance.

Q The goals and policies of—section of the documents?

A That's correct.

Q Comprehensive plan available to anyone who wants a copy of it?

A Yes.

Q Is there anything else that the hearing examiner would look to for guidance in making a decision other than the three areas that we have now identified, Section 4-722(F), Chapter 30 of—Section 4 and the goals and policies?

A Depending on the particular issue, he might review [89] other documents such as past precedent in the legal area, definitions either in the common terms found in the dictionary or in planning books or publications.

MR. BURNS: Mr. Clemens, I think that's all I have for today. I would like to recess for the day and continue tomorrow after I have had a chance to review these documents and hopefully we will finish up early in the morning. Is that okay with you, Counsel?

MR. KELLOGG: You bet.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON

No. C 82-59 M

PLAYTIME THEATERS, INC., a Washington corporation,
and KUKIO BAY PROPERTIES, INC.,
a Washington corporation,
vs. *Plaintiff,*

THE CITY OF RENTON, and THE HONORABLE BARBARA Y.
SHINPOCH, as Mayor of the City of Renton and EARL
CLYMER, ROBERT HUGHES, NANCY MATHEWS, JOHN
REED, RANDY ROCKHILL, RICHARD STREDICKE and TOM
TRIMM, as members of the City Council of the City
of Renton; Served on DELORES A. MEAD, City Clerk
and JIM BOURASA, as Acting Chief of Police of the
City of Renton,

Defendants,

jointly and severally, in their
representative capacities only

DEPOSITION UPON ORAL EXAMINATION OF
DAVID R. CLEMENS, VOLUME II

Taken at Renton City Hall, Renton Washington

DATE TAKEN: March 4, 1982

COURT REPORTER: Peggy Mitchell, RPR

BURTON, WILKERSON & PHELPS, INC.
Registered Professional Reporters
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ATTORNEY

EXAMINATION

Mr. Burns

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Mr. Barber

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Mr. Burns (Further)

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EXHIBITS

NO.

DESCRIPTION

MARKED

2

Map

pg. 2

[2] RENTON, WASHINGTON;
WEDNESDAY, MARCH 3, 1982
10:00 a.m.

DAVID R. CLEMENS

having been duly sworn, was examined and testified as follows:

(Exhibit No. 2 marked for identification)

EXAMINATION

BY MR. BURNS:

Q Mr. Clemens, yesterday we were using a map on the board which was a full-scale size zoning map which we had marked at the end as Exhibit No. 1. I am handing you now what's been marked as Exhibit No. 2 and which is a photocopy of a portion of Exhibit No. 1. Is that map which is now marked Exhibit No. 2 a duplicate of the map that we were using yesterday?

A It does appear to be.

Q And are the areas marked and identified by the numbers 2, 3, 4, and 5 and 6 and with the letters A through E, are those numbers and letters in the same location as they were on the map yesterday?

A They appear to be.

Q And now the areas that I have shaded in in red on this Exhibit No. 2, are those correct approximations [3] of the areas which you testified yesterday were not available for use as an adult motion picture theater?

A I think you have got it backwards. Not available?

Q Yes. That are shaded in in red.

A Oh, I'm sorry. Okay. Yes, to the best of my recollection.

Q Now, you testified yesterday that certain areas which you had previously identified as being available were no longer available; is that correct?

A Yes.

Q And those areas are marked in red on Exhibit No. 2 with the exception of this area at the bottom which has the G in it, the center of it; is that correct?

A Yes, we had previously deleted that area.

Q Now, how come these areas are no longer available?

A In rereviewing the mapped documents that we prepared in the course of preparing for the maps for the City Attorneys office which we discussed yesterday, we noted that the closing section of the Ordinance had been improperly illustrated on the maps, and as a result several properties which were previously thought to be available for adult entertainment uses had to be deleted.

Q What do you mean, the closing portions of the Ordinance had been improperly illustrated?

[4] A Paragraph B of the code section indicates that the dimensions that are specified in the Ordinance are taken to the nearest point of any parcel. So that if even a portion of a parcel is influenced by the regulations restricting adult entertainment uses, the entire parcel is encompassed by that regulation. As a result of that, several of the parcels, particularly the larger parcels which were touched, say, on the side or only a portion of the property, had to all be deleted.

Q Now, have you had a chance during the evening to review the maps that you made relative to the exact locations where an adult theater could locate?

A No, I did not review that.

Q So you are not able to add to your testimony of yesterday relative to whether or not the areas that are exhibited now on Exhibit 2 accurately describe the exact boundaries of the areas in question?

A Not any more so than yesterday.

Q Mr. Clemens, our request for production of documents, Request No. 4, asks that all information, studies or other documents in possession of the City of Renton as agents, servants and/or attorneys that show effects of adult businesses on property values in neighborhoods of the City of Renton be produced as [5] well as all

studies done by the City Planning Department in preparation or the formulation of Ordinance No. 3526. Now, yesterday I was given a packet of documents which has a label on it "Answer No. 3," and are the documents contained within this packet labeled No. 3, and I am handing you that packet of documents, do those contain all documents which are in response to No. 3 which requires all studies done by the Planning Department planning staff or used for, considered by the Planning Department or staff in preparation or formulation of ordinance No. 3526?

MR. KELLOGG: Let's go off the record for a moment. Can we recess for a second?

MR. BURNS: Sure.

(Short recess taken)

BY MR. BURNS:

Q My question, Mr. Clemens, was are those all the studies?

A The packet that you have provided to us is the answer to No. 3 to your request for production contains a number of documents, some of which I was aware of and had previously evaluated at the time of the Ordinance was prepared, and there are some other additional documents which, to the best of my recollection, I [6] had not previously seen.

Q Are there any documents that you did see prior to the adoption of the Ordinance and considered which are not in the packet?

A Not to the best of my recollection.

Q Then going—

MR. KELLOGG: Let's go off the record again, Jack.

(Discussion off the record)

A I don't recall at this time what materials was in the Planning Department's working file on this subject. Any of the documents which were in the file, as I understand it, would have been in the City Clerk's files on this issue since they are the record keepers for the City. So I can only presume that with the exception of my own personal notes on meetings or discussions that occurred, which were removed from the file as a part of the culling of our files which we do on a semiannual basis, are the only documents I can think of that would not have been included here.

Q Just your personal notes may be missing.

A Yes.

Q The first document here is a copy of the Supreme Court decision of State of Washington, *Northend Cinema vs. Seattle*. Did you consider that document [7] prior to adoption of the Ordinance?

A Yes, I did.

Q There is a review of adult theater cases by Dona N. Cloud; did you consider that document?

A Yes, I did.

Q There is a zoning and planning law report dated December 19, 1977 which discusses the United States Supreme Court, *Young vs. American Mini Theaters*; did you review that document?

A I believe that I did.

Q There is a memorandum to interested parties from Richard W. Demig, city auditor about Marysville licensing ordinance; did you review that document?

A I don't recall whether I reviewed that document specifically. I do recall discussion in the proceedings that dealt with Marysville's approach, but I don't recall specifically whether I reviewed that document.

Q When you say discussions about the proceedings, what do you mean or discussions in the proceedings?

A During the public meetings, which the Planning and Development Committee held, there were discussions of numerous cities' approaches to the regulation of adult

entertainment uses, Maryville's approaches was one of the ones that was discussed.

[8] Q This is apparently a Trial Brief of Plaintiff, *City of Des Moines vs. David W. Wilson* in Des Moines Municipal Court; did you review that document?

A I don't believe that I did.

Q There is a planning advisory services bulletin report No. 327 regulating sex businesses; did you review that document?

A I don't recall specifically that I did.

Q Off the record.

(Discussion off the record)

BY MR. BURNS:

Q The next document appears to be another copy of the December 1977 zoning and planning law report relating to *Young vs. American Mini Theaters*.

A As I indicated, I believe that I reviewed that report.

Q There appears to be a copy of Ordinance No. 105584 of the City of Seattle relating to the prohibition of adult motion picture theaters in the CG and all more intensive zones; did you review that document?

A I believe that I did.

Q There is a reprint from the Municipal Research and Service Association of Washington cities on the review of adult theater cases by Dona Cloud which I believe is duplication of a prior.

[9] A Yes, I believe I reviewed that report.

Q Appears to be a Seattle license code Ordinance 10934 which regulates adult entertainment studios; did you review that document?

A I don't recall reviewing that particular document.

Q Some sort of ordinance from the City of Jacksonville about making amendments to an ordinance for adult entertainment facilities and activities.

A I don't recall reviewing that one specifically.

Q There is an ordinance of the City of Colorado Springs regulating the establishment and separation of adult uses.

A I don't recall that—reviewing that document.

Q There is an ordinance of the City of Falls Church regulating adult bookstores and adult motion picture theaters.

A I am not positive about that one because I have relatives in that general area and the topic of that discussion had come up at a separate time, so I don't recall specifically whether I did or did not.

Q There appears to be adult entertainment business ordinance contained on three pages, but I can't identify where it came from. Maybe if you can look at that and see if you recall reviewing it?

A Appears to be from Sparks, Nevada would appear and I [10] don't recall reviewing this specific document.

Q There is an ordinance from Las Vegas, Nevada about sexually oriented businesses.

A I don't recall reviewing that.

Q There appears to be a synopsis of cases, legal cases and legal principle, relating to the control or regulation of adult businesses and/or merchandise.

A I am not positive on that document. I would guess that I probably did review that particular document, but I can't tell you for certain the date.

Q County Council of the Prince George's County Maryland, a zoning bill, did you review that document?

A I don't specifically recall reviewing that one.

Q A San Diego, California adult entertainment ordinance of some sort.

A I don't recall specifically that document.

Q And then finally there appears to be a cutout from the Seattle Times April 11, 1980, regarding adult theater owner in Des Moines suing over a community impact licensing ordinance.

A Okay. I am not certain whether I saw that document or it came up in the testimony during one of the

Planning and Development Committee meetings, and I am aware of the general content of that document.

[11] Q You aware that kind of ordinance has been found unconstitutional?

A I am not certain that I am aware of that.

MR. KELLOGG: Off the record.

(Discussion off the record)

BY MR. BURNS:

Q Now Mr. Clemens, as I recall your testimony at the hearing on a Temporary Restraining Order, you indicated that you reviewed a summary of findings and conclusions of the City of Seattle relative to the adoption of their zoning ordinance for adult theaters. Is that a fair summarization of your testimony?

A That's correct.

Q Which of these documents, if any, were you referring to?

A In particular, the synopsis of the State Supreme Court's action and the report Review of Adult Theater Cases by Dona N. Cloud, assistant corporation counsel for City of Seattle. Particularly was speaking to those two documents.

Q So you're referring to the Supreme Court decision and a discussion of legal cases by Dona Cloud relative to the propriety of regulating adult businesses; is that correct?

[12] A Yes. Her report also includes a summary of the Seattle experience.

Q Did you ever look at the studies, the underlying studies that were done by the Planning Department or the Planning Commission in the City of Seattle relative to the effects of adult businesses on residential communities?

A Not prior to the adoption of the Ordinance. Subsequently I have reviewed them as—at the request of our attorneys office and with regards to this litigation.

Q So prior to that, you have never reviewed the studies themselves or any summary or conclusion of the studies themselves other than in the context of these two documents.

A That's correct.

Q Now, I had asked and in request No. 6 for all crime reports generated by the City of Renton police department in the past five years relative to any and all crimes associated with adult businesses together with any and all crime reports relating to prostitution and assault within the City of Renton. The response that I received yesterday indicated that there were none. By that should I take it that there have been no arrests for assault or prostitution [13] within the City of Renton within the past five years?

MR. BARBER: Object to the form of the question. Also there is no foundation. If I may, Mr. Burns, I believe the response refers to your request for production of documents to the City of Renton; is that correct?

MR. BURNS: Right.

MR. BARBER: Well, our response to that request for production of documents, of course, would encompass city officials other than Mr. Clemens and without a sufficient showing of foundation that Mr. Clemens would have any knowledge in this area, I don't think his testimony would be of any probative value.

BY MR. BURNS:

Q Within the scope of your knowledge, can you tell me whether it is fair to assume from this response that there are—there have been no arrests for prostitution?

A I have no way of knowing.

Q Do you know of any arrests for prostitution?

A I don't personally know of any.

Q Do you know of any arrests for assault?

A I am not aware of any police reports.

Q Now, you testified I believe at the Temporary [14] Restraining Order hearing that you perceived two adverse effects from adult businesses located within the City of Renton, those being an increase in prostitution and assaults. Is that an accurate recollection of your testimony?

A I believe the testimony was that there would be an increase in crime generally of the two types that you have just described.

Q On what do you base your opinion that there would be an increase in crime of those types?

A To the best of my recollection, there was discussion at at least one of the policy or planning development committee meetings at which there was testimony given that crime of that type would be or could be expected with the implementation of adult entertainment land uses.

Q Did that testimony come from citizens or from a police department member?

A I do not recall specifically.

Q Did you attempt to verify in any way that adult businesses, the location of adult businesses, would lead to an increase in the crimes of prostitution and assault by checking with the police department in any localities where adult businesses are located?

A No, I did not.

[15] Q Did you check with the City of Tacoma in any way?

A No, I did not.

Q Or the City of Seattle?

A No.

Q Or the City of Bremerton?

A No.

Q City of Pascoe?

A No.

Q City of Spokane?

A No.

Q So the Planning Department, through you, did nothing to verify or substantiate the assertion that someone made at a policy and planning committee meeting that

the location of adult businesses in the City of Renton would lead to increase in the crimes of assault and prostitution.

MR. BARBER: Object to the form of that question.

A The only independent verification that we did was the review of some of the documents that we have already discussed, and to the best of my recollection at this point, there was discussion of increased crime activity that could be expected to be related to that type of use.

[16] BY MR. BURNS:

Q Which documents did you review which indicated that?

MR. BARBER: Can we take a recess for a few minutes while Mr. Clemens reads those through?

(Short recess taken)

A The two places that the—first the State Supreme Court's synopsis and the synopsis from the Seattle city attorneys office, both indicate that the planning or the department of community developments report to the Planning Commission and ultimately the City Council suggested there would be an increase in crime with those types of uses. And I relied on that information.

BY MR. BURNS:

Q You also indicated that you had discussions with somebody. Who did you discuss it with?

A I don't recall any discussions prior to the Ordinance. I have subsequently had discussions with the City of Seattle.

Q But nothing prior to the Ordinance.

A Not to the best of my recollection.

Q So the only thing that you relied on there would be an increase of the crimes of assault and prostitution is the comments in the *Northend Cinema vs. Seattle* case?

[17] A That's correct.

Q Now, I think you also testified that there was some concern that there would be an adverse effect on property values. Is that correct?

A That's correct.

Q Did you contact any businesses that were located next to adult businesses anywhere in the State of Washington to determine whether there had been an adverse effect on property values?

A No, I did not.

Q On what did you base your conclusion that there would be an adverse effect on property values?

A Specifically, again, the same documents related to the Northend Cinema case in the City of Seattle. Secondly, also some prior testimony that I had received in my position with the City of Milpitas, California related to an adult bookstore case. There was testimony given in that case that the uses in the immediate vicinity of that adult bookstore were being adversely affected by reduction in customer trade.

Q But you didn't undertake anywhere to make an examination of that fact to underlie or did you at that time in Milpitas undertake any examination to verify whether that assertion was correct or accurate?

[18] A No, sir, I did not.

Q Did you do anything here to gather any empirical evidence to establish whether that assertion that there would be an adverse effect on property values was true or accurate?

A No, sir, I did not.

Q So you relied merely upon the assertion rather than on any empirical evidence.

A That's accurate.

Q Now, are there other adult type businesses in the City of Renton other than adult motion picture theater?

A I'm not aware of even an adult motion picture theater in the City of Renton.

Q Are there bars?

A Yes, there are.

Q Taverns?

A Yes.

Q And those are businesses that are limited to persons over 21 years of age?

A I believe that's correct.

Q And do you have an estimate of how many bars and taverns there are within the City?

A I don't believe we have ever prepared an accurate count. I would certainly say there are numerous.

[19] Q When you say numerous, can you give me a rough estimate of numbers?

A Probably a dozen, give or take a dozen.

Q So anywhere from 12 to 24?

A That's possible. As I say, I don't believe we have ever done an accurate study of how many.

Q Are there any locational restrictions on bars or taverns?

A No. It is my understanding that the local municipalities are preempted by the states regulations.

Q Are there any adverse effects as a planner that you see that are associated with locating bars and taverns in any areas of the City?

A As a planning professional, I have some difficulty with bars and taverns in neighborhood shopping center types of locations. They, as a land use activity, would tend to be a use that is not similar in my view to a neighborhood commercial activity, but would be more consistent with a general business area or central business district.

Q As a planning professional, what would be your opinion as to an appropriate land use area for a motion picture theater?

A Depending upon its scale, it might be appropriate in a neighborhood shopping center, but most likely in an [20] area where more general business activities occur.

Q As a land use professional, would it be a good planning concept to locate a motion picture theater in a heavy industry area?

A In general, I wouldn't find that inconsistent with good land use practice.

Q Would you find it consistent to have a general commercial kind of project like a motion picture theater in amongst warehouses and railroad and things of that nature?

A Depending upon the specific location, it might be very appropriate. If it's on a major arterial in an industrial area, it would provide an excellent opportunity for shared use of parking, different traffic pattern usages, which would make better use of the property.

Q From a land use point of view, generally would you agree that a motion picture theater is a commercial oriented kind of business?

A Yes, I think that's a reasonable assumption.

Q From a planning point of view, where do commercial businesses tend to locate?

A Generally speaking, in areas where there is other commercial businesses generally of the same nature or intensity.

[21] Q And the purpose of locating in those areas is what?

A Compatibility of use, sharing of customer trade and traffic, activities of that type.

Q Now, the only distinction between a motion picture theater and adult motion picture theater is defined by Ordinance No. 3526 is the image on the screen, is it not?

A I believe that's the case, yes.

Q And what operational characteristics as a land use professional do you find different between an adult motion picture theater and a motion picture theater, period?

A The major difference would typically be the amount of traffic and where that traffic was coming from. Generally speaking, adult theater, because of the fact they are not extensively located throughout the general market area, would draw from a larger area than a general audience theater.

Q And on what basis do you make that conclusion that they would draw from a larger or different area than a general release theater?

A Primarily on the basis of the Northend Cinema documents, which we previously discussed, and it appears consistent in my own analysis of the availability of those types of theaters in the general market area.

[22] Q Are there any other operational characteristics of adult motion picture theater that you find different from a regular or general release motion picture theater?

A The other potential impact could be the manner in which advertising signs are utilized on the structure itself.

Q Any other operational characteristics that you find different between the two uses?

A Not that come immediately to mind.

Q Does the City of Renton have a sign code?

A Yes, it does.

Q And does that code regulate the size, kind and quality of material that can be placed on various businesses?

A Only dimensional criteria.

Q Does the City of Renton have a traffic code?

A I believe that it does.

Q And to your knowledge and belief, does the City of Renton enforce that traffic code?

A I would assume that it does, if it has one.

Q And can you identify for me now any other operational characteristics that you deem to be different between an adult motion picture theater and a general release motion picture theater, other than the two that you [23] have identified, traffic and signing?

MR. BARBER: Object; it's been asked and answered.

A I can't think of any others.

BY MR. BURNS:

Q Is topless dancing a permitted use in or permitted activity in the City of Renton?

A No, I believe it is not.

Q Didn't it used to be?

A It may have been prior to my coming to the City. I am not familiar with the—those regulations there in the police code.

Q Are massage parlors a permitted use?

A I really don't know the answer to that. It is not regulated by the zoning code, which I am familiar with.

Q Do you know if there are any massage parlors in the City?

A I frankly do not know.

Q Who is responsible for drafting this Ordinance, 3526?

A I believe that it was drafted by the City Attorneys office following the discussions which we have previously gone through.

Q At what point in this process was it drafted? Was it drafted before you got to the Planning Commission or [24] was it drafted after it was referred back to the Council by the Planning and Development Committee? At what point in time was it drafted?

A To the best of my knowledge, the Ordinance was drafted after the Planning and Development Committee's report was actually issued. I believe that was contained in one of the documents that you received.

Q I see from the minutes that I got that—apparently on March 5th or 6th of 1981, the planning development or I think that was the date, maybe it was April—on April 6th, 1981, the Planning and Development Committee report was referred to or the Planning and Development Committee made its report to the City Council. The same minutes reflect the matter was referred to Ways and Means for an ordinance. Is that the normal procedure?

A Yes, it is.

Q But I also see in those same minutes that the Ordinance had its first reading on that same day at the same Council meeting. Is an ordinance read before its been drafted?

A No. The procedure that was used there is not unusual. The—in the case in question, the Ordinance was being drafted at the direction of the Planning and Development Committee for transmittal to [25] the Ways and Means Committee concurrently with the transmittal of the committee's report to the Council, and the two were available simultaneously.

Q So the Ordinance was drafted sometime before the committee's report was made to the full Council; is that correct?

A That would be correct.

Q Did the Planning Department have any input into that Ordinance?

A Not specific input into the precise wordage of the Ordinance. We did discuss on numerous occasions with the committee what standards might be appropriate in the Ordinance.

Q Now, I have been going over the affidavit that you committed in opposition to the motion for a Temporary Restraining Order, and it says at Page 2 that "I was present at all meetings of the City Council and its Planning and Development Committee." That appears to be different than your testimony yesterday wherein you indicated that you didn't think you were at certain meetings. Based on your present recollection, were you present at all meetings of the City Council and its Planning and Development Committee?

A I believe the statement that I made yesterday is the best of my recollection is that I was not present at [26] the Council meeting where the second reading and adoption of the Ordinance occurred.

Q So it would only be that last meeting.

A Yes.

Q Now, in your capacity as acting planning director and senior planner and all those other capacities that you held, were you responsible for preparing the material that was presented to the City Council and to the Planning and Development Committee?

A It depended upon the nature of the discussion before the committee. If it was issues of planning policy and similar nature, we would typically prepare a memorandum or be prepared to discuss in the committee meeting on the floor a particular issue.

Q You have handed me a lot of reports and studies that—some of which you looked at and some of which you didn't look at. Can you tell me which of these reports and studies, if any, were actually given to members of the Planning and Development Committee?

A I frankly don't recall whether any of them were given to the committee.

Q On what did the committee then base its decision?

A The oral testimony of ourselves, the attorneys of-fice, the members of the public that spoke at the public meetings.

[27] Q Did the Council, any members of the Council, to your knowledge, receive any of these reports?

A I don't have independent knowledge of that.

Q So to your knowledge you don't know one way or another.

A I don't know either way.

Q You attended, I take it, the first City Council meeting where the first reading was had.

A That's correct.

Q And I listened to a tape of that meeting this morning. Was there, to your recollection, any discussion or report made by your planning group to the City Council relative to this Ordinance?

A Not to the best of my knowledge.

Q Did the City Council, to the best of your knowledge and recollection, consider anything other than the written report of the Planning and Development Committee?

A No to the best of my knowledge and that would be standard practice.

Q Did the City Council as a whole hear any public testimony, to the best of your recollection?

A I don't recall whether there was testimony on the floor that night or not. I know there was discussion

among the members, but whether there was independent testimony, I don't recall at this time.

[28] Q This Ordinance and all the empirical data that we have gone through here appears that this started out as an adult entertainment use Ordinance; is that correct?

A The general topic was referred originally to the planning development committee, that's correct.

Q Based on your attendance at all these meetings, how did it evolve that adult motion picture theaters were singled out for special treatment as opposed to other adult entertainment uses?

A My recollection was that as the discussion evolved, the conclusion was there were basically two types of activities which the City would have an interest in regulating. The first was theaters, the second was bookstores. And after extensive discussion among the members of the committee, the conclusion was that the adult bookstore issue would be much more difficult and much more delicate to regulate and they chose only to include adult theaters.

Q On what basis did they come to that conclusion?

A At least in part based upon the discussion provided by the City Attorneys office as it relates to the background of other cities' ability and luck in the courts.

Q Did they feel that was a general tenor of the discussion; they felt that somehow bookstores had more [29] of a first amendment protection than movie houses?

MR. BARBER: I object; calls for speculation.

A That may have been the case.

BY MR. BURNS:

Q Were any changes made to the Ordinance along the way after it was drafted?

A Not to the best of my knowledge.

Q In a memorandum submitted to the Court by counsel for the City, they have said that the interpretation of the Ordinance that adult motion picture theaters are allowed as a matter of right in the B-1 zone is a

well publicized administrative view of the City of Renton—or let me read the sentence in entirety. “That interpretation is contrary to the well publicized administrative view of the City of Renton that adult movie picture theater is a permitted use of B-1 and more intensive land use zoning classifications currently in use with the City of Renton except to the extent that the specific uses prohibited by the terms of said Ordinance” and so forth and so on. Are you aware of any well publicized administrative view of the City of Renton that adult motion—movie picture theater is a permitted use within the B-1 zone?

A That has been the contention of our department since the issue originally came up. It is, to the best of my [30] knowledge, everyone who has discussed the matter has assumed that that was the case.

Q Well, when did the issue first come up, when this litigation was started?

A No, sir.

Q It says well publicized administrative view. Has it were been publicized, this administrative view?

A It has certainly been on the Council floor at least once at the time that the Ordinance was originally adopted.

Q Would that be the meeting of April 6th where it was read for the first time?

A It could have been or it could have been prior to that. I don't recall specifically.

Q Has there ever been any press release about this?

A Not to the best of my knowledge.

Q Has it ever been publicized as you understand that term?

A I know that there were several articles in the Renton or, I'm sorry, in the Record Chronicle, the City's local paper, which discussed the topic and it may have been included in those topics, but I can't say specifically.

Q Now, I listened to a tape this morning of the meeting of April 6th, and one Council man asked the question

“is there any place where these businesses can locate,” and [31] the Mayor, I think, deferred to somebody in the Planning Department and somebody in the background said “yes.” Is that the publication that you are talking about at the Council meeting?

A It could have been.

Q Can you give me any specific or identify any specific instance where the view that an adult motion picture may locate in the B-1 and more intensive land use classification has been publicized other than what you have already described?

A No.

Q You cannot give me a specific example today?

MR. BARBER: Objection; asked and answered.

A Other than what we have already discussed.

BY MR. BURNS:

Q We talked yesterday about a determination or a hypothetical example where there was some contest as to whether or not an adult motion picture theater would be allowed in the B-1 zone, and do you recall that hypothetical discussion that we had?

A There were several. I believe that I recall it.

Q And you indicated that if there were a dispute as to an interpretation whether a use was a permitted use or not permitted use, if the applicant felt aggrieved by that dispute, with the administrative people here, he could [32] appeal that to a city hearing examiner. Do you recall that testimony?

A Yes.

Q Now, that appeal to the administrative hearing examiner would be pursuant to Chapter 30 of Title 4, if I understood your testimony?

A That's correct.

Q And the hearing examiner would exercise during that process the discretion that is vested in him to make determinations based upon the goals and policies and his

judgment of how those things relate to the particular use in question; is that correct?

A That's correct.

Q Now, those procedures provide specific procedures for the hearing examiner to follow and they set down guidelines and time periods within which he must act, isn't that correct?

A That's correct.

Q And I take it that both from that appeal of that kind of determination where there has been a dispute about an administrative interpretation and also from the denial of a conditional use permit, the appropriate appeal would then be to the City Council, is that your understanding of the zoning procedures?

A No. In the case of administrative appeal, the appeal [33] of the examiner's decision is to Superior Court.

Q Okay. Could you show me that portion of the—

A I have got it here.

Q Which section is that?

A Would be Section 4-3011 capitol letter B, Paragraph 5.

Q May I see that?

A Sure. It is this paragraph here.

Q So the appeal from the administrative determination would be to the hearing—the Superior Court.

A That's correct.

Q Now, the appeal from a denial of a conditional use, would that go to the City Council?

A To the City Council, that's correct.

Q In the provisions, these administrative provisions, is there any requirement that the City Council make the decision within a certain period of time? The applicable provision that I found, just to help you out, was 3017.

A There doesn't appear to be a specific time limit established.

MR. BARBER: Move to strike the answer on the basis it calls for a legal conclusion.

BY MR. BURNS:

Q To your knowledge, Mr. Clemens, was there anything other than the documents we have seen here today [34] considered by the Council or planning development committee, if they considered what we have seen?

A Not to the best of my knowledge.

Q Mr. Clemens, document Request No. 4 requested all information, studies or other documents relative to the effects of adult businesses on property values in neighborhoods of the City of Renton. In response, this packet of documents in an envelope entitled or with a tag on it "Answer No. 4" were produced. To the best of your knowledge, are those all the documents that would be responsive to that request?

MR. BARBER: Again, subject to the the same limitation to the City's response to the plaintiffs' request for production, which may encompass staff of the City of Renton other than Mr. Clemens.

MR. BURNS: I am presuming the City produced everything and didn't hold back at all.

MR. BARBER: The City complied with the Federal Rules of Civil Procedure.

A To the best of my knowledge, these are the documents that were presented.

BY MR. BURNS:

Q There are two packets of documents included in that response. One being a letter, one being a three-page packet which is headed by a letter dated March 4, [35] 1981, to the Renton City Council from Robert L. Anderson, accompanied by a two-page document which contains a list of names and some locations. Could you—and other notations. These two pages, which is a list of names, what is that, to your knowledge?

A To the best of my knowledge, this is a list of the persons that testified—at least it is a partial list of the persons who testified at the March 5th, 1980 meeting—

'81. I lost a year. The public meeting which was held by the Planning and Development Committee to discuss this subject.

Q Do you know who prepared that list?

A I'm not totally familiar with the handwriting, but I believe it was a member of the Council's committee.

Q That would be the planning development committee, one of the members of that committee?

A Yes, that's correct.

Q Was there a sign-in sheet for the public; is that typical procedure here in Renton?

A No, there was none and is not a typical procedure.

Q The next is a packet of notes which appears to describe in a little more detail the testimony of certain people. Are you familiar with that document, have you seen it before?

A Yes, I have.

[36] Q Who is the author of this document?

A The assistant city attorney, Mr. Kellogg.

Q And do you know when that document was prepared?

A I did not see it prepared. I can only conclude from the notes at the top it was prepared at the meeting or immediately subsequent to the meeting of March 5th, 1981 of the planning development committee.

Q Question No. 10 asks for all interdepartmental memorandums, correspondence or other communications between agents, servants, employees and/or elected or appointed officials of the City of Renton relative to Ordinance No. 3526. I am handing you a packet of documents which came from an envelope with the "Answer to No. 10" on a label on it and ask you to review that and tell me if you know of any other documents which would be responsive to this request which are not included in that packet?

MR. BARBER: Again, I reiterate the comments I made previously with regard to this request for production from the plaintiff and not items that were specif-

ically sought by way of subpoena duces tecum to Mr. Clemens.

A I am not familiar with any documents other than these.

BY MR. BURNS:

Q Mr. Clemens, the first document in this pile is a packet [37] that's headed by large letters that say "notice environmental declaration." Are you familiar with this packet of documents?

A Yes, I am.

Q What's the purpose of this packet of documents?

A The documents contained in that packet are the environmental review that was prepared by the City in response to the State Environmental Policy Act as it relates to the Ordinance in question.

Q Is it typical to do these things before or after an ordinance is enacted?

A Depending on the circumstances, they may occur either way.

Q How is it normally done?

A I would say the most frequent is probably prior to.

Q What's the process that these things have to go through to get done?

A The process involves a circulation to city departments for their review, and you will note there are checklist review sheets contained in that packet. Those review checklists, along with the original environmental checklist which is specified in the state regulations, is reviewed by the City's environmental review committee and a declaration is prepared and subsequently published.

[38] Q Is the purpose or let me ask you, what is the purpose of going through this whole procedure?

A To determine whether the action could have a significant adverse impact on the environment.

Q And is this material in the general and ordinary course of things made available to a City Council or to

any committee thereof prior to their acting so they are aware of any problems the City may foresee?

A They are certainly available as public record. They are typically not even discussed except in the case where an environmental impact statement is prepared.

Q And are these prepared according to some state law?

A Yes, they are.

Q Do you happen to know what law that is?

A I can't give you the precise quote, but it is the State Environmental Policy Act.

Q Now, if I read this right, this final declaration of nonsignificance was prepared on April 15 or reviewed on April 15th 1981, which would have been a couple of days after the enactment of Ordinance No. 3526; is that correct?

A Yes, the review date is April the 15th. I don't recall at this moment what the date of the adoption was.

Q And in going through this, I see a number of checklists [39] which you talked about or review sheets with the heading of the department that did it. And it has got a date at the top "circulated 4-15-81." Is that the date it is actually circulated?

A That would typically be the case.

Q And then down at the bottom it appears somebody signs it and dates it again?

A That would—appears to be the case, yes.

Q In the typical procedure, the date at the top, is that the—generally the date when it is first sent out and the date at the bottom is the date of action by the indicated entity or department?

A Yes. I would assume that's the case.

Q Now, what use is made of these things once, you know, say somebody comes back and they say there may be an impact or there may be something wrong. What use is made of these things?

A If there is a question that is raised during the appeal period, the examiner initially would review those documents and any testimony for and against.

Q During what sort of appeal period; how would an appeal period apply in adoption of an ordinance?

A The appeal period from any decision of the environmental review committee is 14 days from the publication of the notice that they have taken an [40] action.

Q Now, on April 15th, was Steve Munson an assistant planner with your department?

A Yes, he was.

Q And were you his supervisor at that time?

A Yes, I was.

Q And on—and he prepared the environmental checklist review sheet for the Planning Department apparently; would you agree that he did that?

A Yes, he did.

Q Now, he says in one of his conflicts that the or under heading "land use conflicts," that it appears he says "possibly may be too restrictive to be practical"; is that what he said there?

A That appears to be what is stated on this sheet, yes.

Q Was that concern by the planning—as expressed by him on the Planning Department ever brought to the attention of anyone?

A Yes, it was.

Q Whose attention was it brought to?

A The environmental review committee.

Q And who makes up the environmental review committee?

A The environmental review consists of—at that time consisted of the acting planning director, the building official and acting public works director.

[41] Q So you were on that committee?

A That's correct.

Q And did you meet to consider this comment?

A Along with all of the other comments.

Q I don't really see any other comments going through here. When did you meet?

A On I believe you stated it was the 15th of April.

Q And what discussion, if any, did you have about this comment at the environmental review committee meeting?

A We discussed the intent of the Ordinance, what its general application would be and concluded after review that the Ordinance had no significant environmental impact.

Q Did you discuss whether it was too restrictive to be practical from a land use conflicts point of view?

A I don't specifically recall whether we evaluated that precise comment.

Q Has that comment ever been evaluated?

A Yes, I believe it has.

Q When was it evaluated?

A It was evaluated in a broad sense at the time that the Ordinance was adopted and more specifically since this litigation has commenced.

Q And I take it that it is your—strike that.

Your affidavit dated January 27, 1982, at [42] the bottom of Page 3 indicates that "the testimony presented to the committee consistently noted adverse impact upon neighborhoods and businesses within the City of Renton, in the event that adult entertainment and land use was established in close proximity to schools, churches, public or quasi public buildings, businesses and residential uses or zones." What particular adverse impact was noted, if any, upon a school from the operational characteristics of an adult motion picture theater?

A To the best of my recollection, at this time, the comments that were made suggested that an adult entertainment use in the vicinity of a school could have an adverse impact on children either going or coming from school and that, secondarily, that there could be adverse impacts on the ability to teach children in that environment.

Q What adverse impacts would there be on children? How would the mere image on the screen inside the building affect children?

A As I recall the concerns, the public testimony was that the material could have an effect on the people going and coming from the theater and that as a result the children being educated could be affected.

[43] Q How?

A I am not sure that I can answer that.

Q So there was a perceived adverse impact, but you can't identify for me today exactly what that impact would be.

A I think that's correct.

Q Let me ask you the same question with respect to churches. What adverse impact would the operational characteristics of an adult motion picture theater have on churches?

A I believe that one of the characterizations made in the public testimony was that some parishioners might choose not to attend churches in the vicinity of adult motion picture theaters.

Q But would wash—was there any testimony the location of an adult theater would adversely affect the church other than some people may not want to go to church?

A To the best of my recollection, that's the gist of the testimony that was heard.

Q With respect to public or quasi public buildings, what effect, adverse effect, would the operational characteristics of an adult motion picture theater have on those kinds of uses?

A I believe in particular the comment related to public [44] parks and it followed the same general area of concern as was related to schools.

Q And you can't identify what those impacts would be, just that people were concerned.

A That's correct.

Q Is it a fair assessment of what you're telling me that the City and/or the legislative body perceived that there may be problems, but they couldn't identify what those problems were specifically, but they tried to cure them anyway?

MR. BARBER: Object to the form of the question. Misstates the testimony of the witness and calls for speculation.

MR. BURNS: You can answer, if you can.

A I don't know what was in the Council's head.

BY MR. BURNS:

Q We talked about the adverse impact on businesses, I think, property values is one adverse impact that businesses perceived; is that right?

A Yes.

Q Are there any other adverse impacts that you can describe to me today that were considered at the time the Ordinance was adopted that the operational characteristics of an adult motion picture theater would have on businesses?

[45] A I can't recall any at this time.

Q And what operational characteristics of an adult motion picture theater would adversely affect residential zones or uses?

A I believe it was the same area of concern as with schools and parks.

Q In other words, somebody perceived there may be adverse impacts but couldn't identify what those specific effects or adverse impacts would be?

A I can't restate them for you, no.

Q So there is no way for us to determine today exactly what the governmental purpose was in enacting this or what evils the government entity was trying to cure; is that accurate?

MR. BARBER: I object to the form of the question; again, calls for speculation on the part of the witness and also somewhat misstates this witness' testimony.

BY MR. BURNS:

Q Can you identify with particularity today or is there any way we can identify with particularity today the evils which this Ordinance, 3526, was aimed?

MR. BARBER: Object to this question, it is vague and ambiguous what is meant by evils.

MR. BURNS: You can answer.

[46] MR. KELLOGG: The question is over-broad, Jack, and vague.

MR. BURNS: Let him answer it. I will get an over-broad and over-vague answer.

A I don't know what the Council was specifically thinking.

BY MR. BURNS:

Q What can you identify today or is there any way we can identify today the specific adverse impacts on schools, churches, children, that the legislative entity, the Council, was trying to cure by the enactment of Ordinance No. 3526?

MR. BARBER: Object again; calls for speculation from this witness as to what the legislative body or Council had in mind.

A I don't know how I can answer it.

BY MR. BURNS:

Q Are you telling me you can't identify them?

MR. BARBER: Objection; that misstates Mr. Clemens' testimony.

A I don't know—I cannot specify what the Council was thinking.

BY MR. BURNS:

Q Is there any document that we can look to or any record that we can look to to determine the exact [47] adverse impacts of adult uses on churches, schools, children and public parks and residential zones that the Council was directing its attention to be?

A I do not know of any such document.

Q Or any record or any recording.

A Not to the best of my knowledge.

Q On Page 4 of your affidavit, you indicate that several speakers noted that adult theaters and other similar uses are not similar to other commercial activities and their impact extends beyond the limits of the immediate location. The fact that the impact of a commercial activity may extend beyond the limits of the immediate location is not an unusual occurrence, is it?

A Doesn't typically occur in a commercial area, although it could. The typical place where land use impacts extend beyond would more generally be related to more intensive uses, such as industrial uses.

Q You have a regional shopping center; the impact goes beyond the immediate location, doesn't it?

A Yes.

Q You have a general release theater like your Renton Cinemas out here, that draws from a larger area than the immediate area, doesn't it?

A Yes.

[48] Q Is that the kind of impact that you're talking about or are you talking about some other kind of impact?

A In parts, speaking to physical impacts such as traffic coming from outside of the general market area of the City of Renton, but also expressing the general concern, which we have discussed previously, about secondary effect of adult entertainment uses on other kinds of uses in the vicinity.

Q But you haven't been able to identify what those secondary effects are with any particularity, other than some concerns they may have effects; isn't that correct?

MR. BARBER: Objection.

MR. BURNS: You can answer.

MR. BARBER: To the form of the question. And misstates testimony of the witness.

A I think you better restate it. I have lost it.

MR. BURNS: Why don't it read it back, Peggy.

(Question read back)

A With the exception of the two that we previously discussed of traffic and potential for—three, I guess; traffic, potential for crime and potential adverse of signing or advertising.

[49] BY MR. BURNS:

Q So those are the three impacts that you're referring to by that sentence on Page 4 of your affidavit.

MR. BARBER: Could we specifically refer to the line, Mr. Burns?

MR. BURNS: The sentence that's on—beginning at Line 5 and ending at Line 8. "Several speakers noted,"—

A The three that I can identify at this time, based upon my recollection, would be in that general area, that's correct.

BY MR. BURNS:

Q And at Line 15, you talk about speakers commenting on the adverse impacts of adult entertainment land uses on property values within the business and residential community. I take it from the your prior testimony that you did no empirical studies, no studies of any sort, you made no investigations of any kind that would establish that adult entertainment uses do have an adverse effect on property values; is that correct?

A Other than as previously testified to or reviewed of the Seattle experience.

Q So your answer is no, you did not—none of those things other than as previously testified to?

[50] MR. BARBER: Objection as to the form of the question. Misquotes the witness.

A I believe that's correct.

BY MR. BURNS:

Q On Page 5 of your affidavit, beginning at Line 7, you say "their conclusion was the public had expressed sufficient concern in providing detailed examples of the

City of Seattle, Tacoma and other cities to conclude that adult motion picture theaters should be regulated within the City of Renton on the basis of location." What detailed examples were provided from the City of Seattle by the public?

A To the best of my recollection, one or possibly two, I don't recall precisely at this time, parties that lived in Seattle discussed with the Planning and Development Committee the background of the events that led to Seattle's regulating ordinance.

Q What specific detailed examples were provided from the City of Tacoma?

A Again, to the best of my recollection, the—at the time that our Ordinance was being drafted, the City of Tacoma was in the midst of preparing a similar ordinance and testimony was given on the occurrences in the City of Tacoma.

Q What occurrences in the City of Tacoma?

[51] A To the best of my recollection at this time, the discussion was a general background of the problems that led the City of Tacoma to consider legislation.

Q Was any testimony offered by anybody that—from the City of Tacoma about the particular problems that they were having, if any, with adult businesses?

A To the best of my knowledge, no officials of the City of Tacoma testified. There may have been persons residing in the City of Tacoma that testified.

Q Can you recall with any particularity what they may have said now about what was going on in Tacoma?

A Only to the extent that my recollection was that a general audience theater in a generally residential commercial atmosphere had been changed to an adult theater and that the neighbors and the community had expressed sufficient concern that the Tacoma City Council was reviewing the situation.

Q Was there any discussion that an adult motion picture theater had, in Tacoma, had adverse impacts on the neighborhood or the community?

A I can't specify any particular points that were raised.

Q So your recollection of what happened in Tacoma was something to the effect that people were expressing concern that the use of a particular general release [52] theater had changed from general release to adult motion picture theaters?

MR. BARBER: Object to the form of the question.

BY MR. BURNS:

Q Is that—is that a summary of your recollection today?

A As best I can recall it.

Q It says "and other cities." What other cities did they have specific detailed examples of?

A My recollection was that the City of Boston so-called combat zone was raised as a discussion issue.

Q Is there anything in writing about that?

A Nothing that I am aware of, no.

Q How was it brought up?

A My recollection was that it—one of the parties that testified included reference to the Boston experience.

Q Did any official of the City of Tacoma do anything that you know of to verify that there was any factual basis for any of the assertions that were made by anybody relative to the effects of adult uses upon churches, schools, neighborhoods, residences or anything?

A We never contacted—I never contacted the City of Tacoma, and I have no knowledge of what actions they [53] may have taken.

Q Do you know if anybody did anything to verify any of the assertions that were made relative to the effects of adult businesses?

A I don't know what others did. I did not beyond what I have already testified to.

Q And you have no knowledge of what other people may have done.

A That's correct.

Q Do you know if there is any record, based on your knowledge of the records of the City of Tacoma, of what any other person may have done?

A I have no knowledge of any occurrence in the City of Tacoma in the record system.

Q I mean the City of Renton. Do you have any knowledge of any records that exist within the City of Renton that may document what any other person did to verify or find any empirical evidence to support any of the assertions that you're talking about?

MR. BARBER: Object; it is vague. Answer.

A I have no independent knowledge of any additional information that has not been presented here.

BY MR. BURNS:

Q Line 21 of Page 5, you have "based upon the comments, recommendations and debate on the floor of the [54] committee, the City Council adopted the proposed Ordinance on April 23, 1981." What debate are you talking about, where did it occur and in front of whom did it occur?

A The Planning and Development Committee held several meetings, as I believe I testified previously, I don't recall the precise number. At each of those meetings, which was a public meeting in each case, the committee discussed both among itself and with the staff present the subject and the result of those discussions was the committee's report which you have copies of and the decision of the Council.

Q So we are clear, there is no record of those discussions or debate that exist today?

A Not to my knowledge.

Q And you have described as fully as you can your recollection of what went on at those meetings and the concerns that were expressed.

A To the best of my recollection.

Q On Page 6 of your affidavit, talking about your map here, which is exhibit or—well, talking about the map that was attached to your affidavit, you say that "as illustrated on the attached map, there is approximately 400 acres of land within the City of Renton which does not fall within the locational [55] regulations." With respect to that statement, you have now changed that to indicate that these areas on Exhibit 2 hatched in red are also not available; is that right?

A That's correct.

Q Now, you go on to say "with two exceptions the property in question is undeveloped." Could you locate on Exhibit No. 2 or describe for me where those two exceptions are?

A The two exceptions that I believe I was speaking to in that case were the Longacres Racetrack and the Boeing facility, which is not illustrated on map No. 2, but was illustrated on Exhibit No. 1 we previously discussed.

Q So it was your contention that but for the Longacres Racetrack and but for the Boeing facility, all the property was undeveloped; is that what you were saying?

A That's correct.

Q Now, you know, do you know, that there is a Cole Business Center in Area 5 of the map?

A Cole Business owns property within Area No. 5. I don't recall specifically whether they have development on that property.

Q Do you know that there is a Benaroya Business Park [56] that's been completed in Area No. 5?

A Yes.

Q So that is also a developed area.

A I do not recall specifically, but I believe the—that particular location is not within the area that the Ordinance regulations do not apply.

Q Are you—what are you telling me about Benaroya Business Park; you don't think it is located here where I am pointing within the—which is in Area 5 or that

this part of Area 5 is also not within the locational regulations?

A My recollection is that the Benaroya Business Park is not included in areas which would be allowable under the Ordinance for an adult theater.

Q Could you show me where you believe the Benaroya Business Park is on this map?

A It was approximately the point you were previously illustrating.

Q That's where I am pointing right now?

A Yes.

Q And let me—and you are saying that the Benaroya Business Park is not available for use as an adult motion picture theater?

A To the best of my recollection at this time, that's correct.

[57] Q So would we have to carve out another area within Area 5 that is not available and mark it with red hatchings in order to have this map accurately reflect the available area?

A I believe that would be a correct statement. I don't recall specifically how the parcels of the Benaroya Business Park are divided and that would have an effect on whether its entirety or only a portion is affected.

Q Have you prepared a map or any drawing that shows the Benaroya Business Park and determined whether or not it is in or out of Area 5 as an available location?

A I have prepared a map at the request of the City Attorneys office which meets the criteria of the Ordinance.

Q Is the Benaroya Business Park, based on the map that you have prepared, included or excluded from the criteria of the Ordinance, and by included or excluded I mean is it an area where you can locate an adult motion picture theater or not locate an adult motion picture theater?

A I can't state with specificity. My recollection is incomplete as to whether the entire area is deleted from

the area available for adult motion pictures, but definitely a portion is deleted.

[58] Q Would that deleted portion be encompassed within the red hatched area that I am pointing to just to the west of the letter B or would it be further to the east?

A I can't tell you where that line would be based upon my present recollection.

Q Are you telling me now, though, that there is an additional area within Area 5 that is not marked which is unavailable for use as an adult motion picture theater?

A There is—

MR. BARBER: I object on the ground it's been asked and answered.

MR. BURNS: I want to find out what—where I can put one, and I think he is telling me there is another area where I can't put one. And you people have all the answers to that and I would like to find out where it is.

A The point that I was making was that the—there may be additional area which is affected by the Ordinance. I cannot tell you with specificity at this time where that is.

BY MR. BURNS:

Q How do I find that out, Mr. Clemens, where I can and can't put an adult motion picture theater?

[59] MR. BARBER: Object. That's been asked and answered before.

A The process that we utilized was to obtain a copy of a map showing the property lines within the City of Renton, identified the zoning and uses specified in the Ordinance as being protected uses and inscribed circles around those parcels. That's the process that any planning, architectural or engineering professional could accomplish.

BY MR. BURNS:

Q If I were an unrelated party coming in off the street, unrelated to this lawsuit, and asking to locate an adult motion picture theater somewhere in the City of Renton, where can I go, would the City give me that information?

A I would say that typically we would ask the question in reverse. We would say where would you like to locate and then we would inscribe circles around the location suggested to determine whether it meets the Ordinance criteria. If it does, we would indicate so; if it does not, we would indicate it does not.

Q So if I came in and I would have to acquire sites by a process of elimination, I would have to say to you will this site work and you will tell me no, and assuming that it didn't meet the locational [60] requirements and then I would have to guess and go find another site and come back to you?

MR. BARBER: Object to the form of the question.

A Our first suggestions would be to suggest to you that you hire a land use engineering or architectural professional to evaluate the Ordinance and its criteria and locate a potential site for you, at which time we would evaluate that potential site as I had stated, starting from the site and working out rather than the reverse.

BY MR. BURNS:

Q Has the City—now, I recall the testimony in front of the City Council or I heard a tape recording of the City Council meeting of April 6th, and the question was asked by one of the City Councilmen, have you identified areas where an adult theater could locate, and the question or the answer was yes. Do you recall that happening at the meeting of April 6th?

A Yes, I do.

Q And at that time had you identified the areas where an adult motion picture theater could locate?

A We had identified the general areas that would apply, but we had not applied precision to that analysis.

[61] Q And you have now, I take it, applied precision to that analysis and that precise analysis is in the hands of your attorneys?

A That's correct.

Q And your attorneys are refusing to make that available to me or allow you to make it available to me; is that correct?

MR. BARBER: Object to that question. You don't have to answer.

MR. BURNS: Are you refusing to make it available to me, counsel.

MR. BARBER: We have already stated our objection that it is work product.

MR. KELLOGG: Counsel, he just stated how you can determine it for yourself.

MR. BURNS: We are going to try this case by guess or by golly and try to keep secrets.

BY MR. BURNS:

Q On what basis would we determine whether the Benaroya Business Park is in or out?

MR. BARBER: Object to the question. It's been answered by Mr. Clemens

MR. BURNS: I haven't asked that one yet.

BY MR. BURNS:

Q How am I suppose to determine, based on what I see on [62] this map, whether it is in or out?

MR. BARBER: Same objection.

A The process would be to identify the zoning classifications and protected uses and inscribe circles around those uses.

BY MR. BURNS:

Q Have you identified any protected uses within the areas that are marked here as including the circumference of Area 5?

A Yes.

Q And could you describe for me all those protected uses that you have found within or near that area?

A There are, I believe, more than one single-family residence and a school, I believe it is Talbot Hill Elementary School, which applies in this general area.

Q Could you locate for me on this drawing where the residences you have located are?

A I can't precisely. They are located fronting Southwest 43rd Street and the school is off the map to the east.

Q Any other protected uses that you have been able to locate in that area?

A My recollection is that there is also P-1 zoning east of the Valley Freeway, east of the map that is [63] before me, which is a protected use.

Q That's this zoning over here?

A That's correct.

Q The P-1 zoning would require a thousand foot distance from the easterly edge of Area 5, would it not?

A That's correct.

Q The residential areas included along Southwest 43rd would require a thousand feet; is that right?

A That's correct.

Q And this blue line that I am pointing to which has a terminus point of B on our map, Exhibit No. 2, is the area included within that generally encompass that thousand-foot clearance from those residences?

A I am not sure whether it is precisely scaled, but that's the general area involved.

Q Now, what of the locational requirements of the Ordinance may affect the Benaroya Business Park?

A Its proximity to the single-family residences.

Q Along Southwest 43rd?

A That's correct.

Q Now, if I read this Ordinance in Section B correctly, if any portion of the Benaroya Business Park parcel is located within a thousand feet of one of those residences, none of the parcel could be used for an adult motion picture theater?

[64] A That is correct.

Q So that would be the appropriate interpretation to apply to this Ordinance.

A That's our interpretation.

Q Have you made any determination whether any portion of parcel or of the Benaroya Business Park property is located within a thousand feet of residences?

A At least a portion of the Benaroya Business Park ownership is within a thousand feet.

Q Are you telling me that the Benaroya Business Park may be in one or more parcels?

A That may be the case.

Q And at least as to that parcel, even though it is under joint ownership and used for a common purpose, would not be able to be used for an adult motion picture theater?

A I am not sure I understand the question.

Q The Benaroya Business Park owns two parcels of land out there, the Benaroya Business Company owns two different tax assessors parcels of property out there. If—but they have constructed one project on those two parcels of land. If any part of the Benaroya Business Park which has one use on two separate assessors parcels is within the thousand-foot restriction, is the entire Benaroya Business [65] Park excluded from uses of land as an adult motion picture theater?

A We have determined that separate tax parcels would be considered separate parcels for the purposes of this Ordinance.

Q It is like pulling teeth.

* * * *

BY MR. BURNS:

Q How did you go about making this administrative determination that tax parcels is the operative criteria rather than the property parcel on which the proposed use is located?

A The only available records which the City has in its possession which establishes the ownership or salability of property are the assessor's tax [66] records, and on that basis we have used the assessor's tax parcels as parcels as defined by that Ordinance.

Q Now, could you describe for me why the area marked D is not available as use—as a potential use?

A I don't know whether the precise shape of that is correct; however, it is those uses that are within one mile or parcels, tax parcels within one mile of Talbot Hill Elementary School are eliminated.

Q If that's—and I take it Talbot Hill Elementary is out here somewhere?

A Yes.

Q Why is there this gap in here then; why doesn't it extend as deep as parcels D and C do?

A There are numerous parcels that have been separated by Burlington Northern into separate tax parcels in that area, and as I previously noted, I am not sure of the precise shape, but there are parcels which are in and some that are out of the restriction zone.

Q You go on to say in your affidavit that "most of the parcels of property within the 400 acres is appropriately zoned for adult theater use. Furthermore, pursuant to the comprehensive plan, all of the locations are designated as being appropriate for commercial activities thus paving the way for [67] rezoning of those properties which are not presently zoned for adult theater uses." Which of these properties are not presently zoned for adult theater uses?

A There may be some parcels that are currently zoned G, which is a general classification, it is a single-family zone, which are shown in the comprehensive plan for—for, I believe industrial park use that could be re-

zoned to industrial park, and industrial park zoning classification would allow any type of theater.

Q Which areas are those on the map Exhibit 2?

A The potential is there may be area within the vicinity of Area 5 and the vicinity of Area No. 2 which have G zoning potential for rezoning.

Q Within Area 5 that has potential for rezoning. Are those areas within Area 5 that you are talking about, are they presently excluded from an area where an adult motion picture theater could locate as shown by the red hatching on the map?

A I don't recall with precision at this time.

Q How do you go about getting a rezone, assuming that rezone is an avenue we would have to pursue if we found an available location?

A Application would be made to the building and zoning [68] department which would be referred to the land use hearing examiner for report and recommendation to the Council for adoption.

Q Are there any objective criteria or is there a standard that he would use or is it a subjective, discretionary determination by him?

A The criteria established in the Ordinance in my view is essentially objective criteria.

Q Is there any discretion to deny a rezone?

A Yes, I believe there would be discretion.

Q What kind of discretion, how would it operate?

A If the use was found to be in conflict with the comprehensive plan or policies of the City, the potential—there is a potential that the use could be either modified or denied.

Q If you don't like the decision of the hearing examiner, where do you go in a rezone situation?

A The appeal of a decision of the examiner on a rezone is to the City Council.

Q And once again, would the procedure apply that there is no specified time limit within which the City Council must act on a rezone appeal?

A Not to the best of my recollection.

Q There is not county-wide zoning within King County, is there?

[69] A I don't know what you mean by county-wide.

Q There isn't one zoning that applies to all of King County; each municipality and the county can zone independently, isn't that correct?

A Yes.

Q So there is no overall—well, you answered the question.

Now, you say on the last page of your affidavit that "in any event, adult entertainment uses are widely available within the City of Seattle and King County generally."

Could you describe for me the location of any adult theater within King County that is not within the City of Seattle that you're aware of?

A I am not specifically aware of any theaters outside of the City of Seattle. There are other adult entertainment uses in the general area of the Sea-Tac Airport.

Q What other kind of adult uses?

A My recollection from pieces that I have seen in the newspaper at various times suggest there were massage parlors and similar types of uses.

Q But those uses aren't regulated by your adult zoning ordinance, are they?

A No, that's correct.

[70] Q So those uses could locate within Renton; is that correct?

A Subject to any regulations that are not—that I am not familiar with that are outside the zoning regulations.

Q Let me ask you this: could a live burlesque theater locate in the City of Renton now?

A I am not sure how you define burlesque.

Q Well, let me say—let me define it for you and tell me if you can locate here. Have a stage show with ladies and/or men who came out on the stage and took off all

their clothes and performed in an artistic manner, would that be subject to any regulation of the City of Renton?

A Not any zoning regulations. I do not know of whether other regulations of the City might apply.

Q Would the location of an adult bookstore that sold videotape movies which are identical to those shown in an adult movie theater be subject to any zoning regulation of the City of Renton that would restrict their location?

A If you were speaking strictly to sale of the material, I do not believe so.

Q So I could come anywhere into the City or somebody could come anywhere into the City and open up a store [71] and sell the same sort of material that is projected onto a motion picture screen at an adult motion picture theater and they would not be subject to a zoning regulation; is that correct?

MR. BARBER: Objection; asked and answered, I believe.

A As long as we are speaking only to sale of those materials, I believe that's a correct statement.

BY MR. BURNS:

Q So could I operate a panorama parlor, a peep show place in the City of Renton and not be subject to the regulation of Ordinance 3526?

A I would need to review in detail the definitions, but my immediate reaction would be that it would not be an allowable use except as prescribed by the locational criteria of the Ordinance.

Q So I can do a lot of things in this town, but I can't show a motion picture.

MR. BARBER: Objection; it is argumentative.

MR. BURNS: I don't have any other questions. Thank you, Mr. Clemens. You have been patient with me.

(Discussion off the record)

MR. BARBER: I have just a few brief questions, Jack.

[72] EXAMINATION

BY MR. BARBER:

Q Mr. Clemens, yesterday you testified with regard to a meeting where assistant city attorney Mr. Kellogg had appeared and discussed the topic of—surrounding the Ordinance that was subsequently enacted as No. 3526. Do you recall specifically if Mr. Kellogg read from the confidential memorandum which you have reviewed before that hearing?

A I can't recall with specificity whether he did or not.

Q Do you recall if the topic that was discussed at the hearing was the same topic as discussed in the confidential memorandum?

A The topics were the same general subject matter.

Q Do you have any recollection at any time if Mr. Kellogg ever quoted at any time from that confidential memorandum that you reviewed before the meeting?

A I don't recall at this time any specific instance, no.

MR. BARBER: Nothing further.

FURTHER EXAMINATION

BY MR. BURNS:

Q Mr. Clemens, you don't recall whether he quoted or whether he didn't quote or do you recall that he [73] didn't quote?

A I don't recall specifically either way.

Q So he may have and he may not have.

A I believe that's correct.

(Discussion off the record.)

BY MR. BURNS:

Q How are you compensated by the City of Renton, Mr. Clemens; on an hourly, monthly or salary basis?

A Salary basis.

Q Are you subject to civil service or are you appointed and serve at the discretion of somebody?

A Serve at the discretion of the Mayor.

Q You are not subject to civil service?

A No, I am not.

MR. BURNS: That's all.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,
vs.

THE CITY OF RENTON, *et al.*,
Defendants.

No. C82-263R

THE CITY OF RENTON,
a municipal corporation,
Plaintiffs,
vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

**AFFIDAVIT OF DAVID R. CLEMENS
IN SUPPORT OF CITY OF RENTON'S
MOTION FOR SUMMARY JUDGMENT**

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

DAVID R. CLEMENS, being first duly sworn on oath
deposes and says:

2. I have been involved with assisting the Renton City Council in its Adult Land Use Entertainment Ordinances from the start and assisted in providing information to the Council with respect to Ordinances No. 3526 and 3629. I previously appeared as a witness in the Temporary Restraining Order Hearing in this case, having been called by the Plaintiffs.

3. The City Council of the City of Renton did enact Ordinance No. 3629 on the date of May 3, 1982. A certified copy of that Ordinance is attached hereto for the Court's information.

4. Attached hereto is a one page map of the City of Renton. Shown on that map in solid colored areas are those places in the City of Renton where an Adult Entertainment Land Use would be permitted under Ordinance No. 3629, the most recent Ordinance.

5. The land contained within the solid colored areas is in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space.

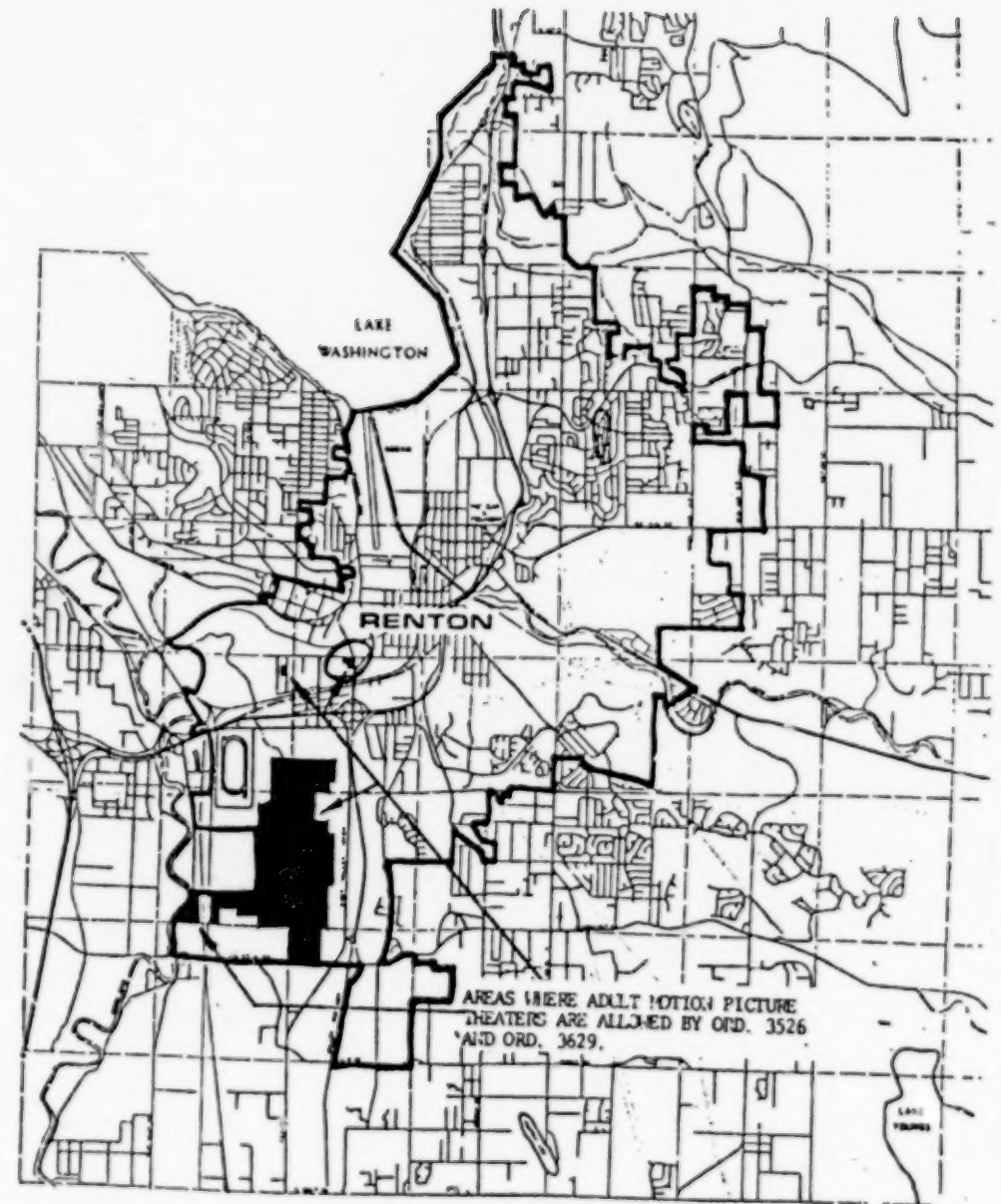
6. The total area within the solid colored areas is five hundred twenty (520) acres. Included in the 520 acres is twenty-seven (27) acres of City property, twenty-two (22) acres as a green-belt area and five (5) acres as a proposed fire station site.

7. There has been a recent Local Improvement District which extended Lind Avenue, which runs north and south through the middle of these properties. That roadway was built as a four lane major arterial. Construction is to begin soon on LID #314, which will improve freeway access and construct several east-west roads that will con-

nect in with previously developed Lind Avenue. Additionally, the City is in the midst of widening and substantially improving S.W. 43rd Street which runs along the southerly boundary of the City and provides access to most of this parcel from the Valley Freeway.

8. It should also be noted that the land in this area is serviced on the north by I-405, and on the east by SR167, the Valley Freeway. These roadways provide good access on the north, east, south and through the middle of the solid colored properties.

• • • •



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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

—
No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,
vs.

THE CITY OF RENTON, *et al.*,
Defendants.

—
AFFIDAVIT OF BRUCE ANDERSON
IN SUPPORT OF PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

Bruce Anderson being first duly sworn on oath, deposes and says:

1. I am a resident of King County, Washington. I graduated from the University of Washington in 1973, after having been awarded a Bachelor of Arts Degree in English. Subsequently, I attended Gonzaga Law School and graduated in 1977 with a Juris Doctorate Degree. In 1979 I was admitted to practice law in the State of Washington. I am currently licensed as an attorney in the State of Washington, although I have never actively practiced law.

2. I am licensed by the State of Washington as an Associate Real Estate Broker and have been so licensed since 1977. Prior to that time and beginning in 1973, I was licensed by the State of Washington as an Associate Realtor. For the past four and one-half years I have been employed by Grubb & Ellis, and have worked in their commercial real estate departments within the Greater Metropolitan Seattle Geographic Area.

3. During the past four and one-half years in the employ of Grubb & Ellis, I have worked in the commercial real estate division specializing in working with developers of commercial properties. In connection therewith, it has been my responsibility to research properties to determine the availability of sites for developers and/or the availability of buildings for purchase, sale or use by a developer. In addition to actively researching the availability of properties and negotiating for the purchase of sites at the request of clients, I have done extensive research relative to the ownership of blocks and tracts of land within the City of Seattle and elsewhere in King County.

4. On February 3, 1982 I was retained by Kukio Bay Properties, Inc. and Playtime Theatres, Inc. to research the availability of property within the corporate limits of the City of Renton for use as an adult motion picture theatre. On that date, I met with Jack R. Burns, and was furnished with a map prepared by David W. Clemens which generally described the areas of the City of Renton where an adult motion picture theatre could purportedly locate. Based upon that documentation and information furnished me, I prepared a map, a copy of which is attached hereto as Exhibit "A", identifying, generally, the areas that he had described to me. From that map, I was able to identify the owners of the properties by going to a local title company and securing detailed maps of the particular areas involved and locating the owners by way of the latest King County Assessor's information. Some

of the assessor's information was outdated or did not reflect the current status of the ownership of the properties involved. By further research of subsequent sales, I was able to determine the present ownership of all properties identified within the areas marked by yellow in the attached Exhibit "A".

5. Subsequent to identifying the owners of these properties, I proceeded to contact each owner to determine the availability of their property for sale or lease for use as an adult motion picture theatre. Generally, I found that none of the property identified on Exhibit "A" is available for sale or lease. In particular, my research disclosed the following:

a. The site marked on Exhibit "A" with the number 2 is included totally within the area owned by Metro and used for a sewage disposal site. This property is intensely developed for that purpose and is much more than a garbage dump. Based upon the extensive development, expensive improvements, and the expressed public desire of Metro to expand its Renton sewage treatment plant, I concluded that this site was not available.

b. On the attached Exhibit "A", the area including Longacres and to the south, identified by the numbers 3, 4 and 4A, is also not available. This property is owned by the Washington Jockey Club, Broad Acres, Inc., and the Washington Horse Breeders Association. All of these properties are generally associated with the operation of Longacres. I spoke with Jim Anderson, the comptroller of these entities, who takes his directions from Morrie Alhadeff and, who exercises general managerial control over the Longacres complex. He indicated to me that he was authorized to speak on behalf of the owners. Longacres is currently pressed for parking space. The property, including that to the south, is not available for sale or lease and, in fact, the owners would give serious consideration to purchasing additional adjoining property if

any became available to meet their current and projected needs.

c. The area on Exhibit "A" identified by the number 6 is owned by the Jack A. Benaroya Company and has been developed as a business park. I spoke with Joel Benoliel, general counsel and secretary for Jack A. Benaroya Company, relative to the availability of his property for sale or lease for a motion picture theatre. He indicated to me that he was authorized to speak on behalf of the corporate entity. He advised me that there are seven industrial oriented buildings on the site, all of which are leased to the Boeing Company with no space available for sale or lease for any reason whatsoever. In addition, he indicated that of the Benaroya Business Parks located within the City of Renton, there is no space available for lease nor for sale.

d. The area on Exhibit "A" identified by the number 7 is part of the Koll Business Center. I spoke with Mark Niemrow, attorney and vice-president in charge of finance for the corporate entity. He indicated to me that he was authorized to speak on behalf of the corporation. He further indicated to me that the property was not available for sale or lease inasmuch as any theatre use would not comply with the covenants, conditions and restrictions imposed upon the complex.

e. On the map, the area identified by the number 9 belongs to the Sternco Land Company. I spoke with Allen Sternof, a family member and principal of Sternco Land Company. He indicated to me that he was authorized to speak on behalf of the owners; and advised me that the property is definitely not for sale.

f. The property identified on Exhibit "A" as number 10 is owned by William E. Roberts. I spoke with Mr. Roberts relative to a sale or lease of the property for an adult motion picture theatre. The property in question is currently vacant land and for sale. He indicated that

the property would not be available for a theatre location, particularly an adult motion picture theatre, inasmuch as he felt that such a use would be incompatible with current uses and projected uses of the property.

g. Attached hereto as Exhibit "B" is a map showing a section of the property indicated on Exhibit "A" which is bordered on the West by Interurban Avenue and on the East by Burlington Northern railroad tracks. Identified on this map is *site 11*. Site 11 contains approximately .33 acres of total land. This area is not large enough to locate a motion picture theatre of a reasonable size per the needs of the plaintiff, Kukio Bay Properties, Inc., which I understand to be 1 to 1 $\frac{1}{4}$ acres (see Volume I, Deposition of David R. Clemens, pages 68-69) and, thus, I did not consider this site further, other than to note that the site is currently fully developed with a warehouse facility.

h. The site identified by the number 12 on Exhibit "B". It is an owner occupied facility which is developed as a warehouse quasi-manufacturing facility and is not suitable for use as a motion picture theatre of any sort.

i. The site identified by the number 13 on Exhibit "B" is owned by Norman K. Dewey. I spoke with Mr. Dewey, who indicated to me that the property is not available for sale. The property is currently being used by the owner as a wholesale hobby and toy outlet and the space is unavailable for sale or rent in the foreseeable future.

j. The site identified by number 14 on Exhibit "B" is owned by Harold Hill and Bruce Rowe. This property is presently built out as a warehouse site and is fully occupied; and the owners indicated to me that the property as constructed is not available for sale or lease for any purpose whatsoever.

k. The site identified by number 14A on the attached Exhibit "B" is owned by the R.A. Heitz Construction Co. This site is presently built out as warehouse space and

is occupied by the owners; and no part or parcel is available for sale or lease for any reason, much less as a theatre.

l. The site identified by number 16 on Exhibit "A" is part of a larger parcel which was recently purchased by Holvick, deRegt & Koering. I was able to contact an authorized agent of their, Ed Sullivan, at his offices in Sunnyville, California, area code (408) 773-0111. Mr. Sullivan indicated to me that the property was recently purchased and is being developed as a "high tech—research and development" type of product. Smaller buildings will be constructed to be sold to R & D owner/users. He indicated to me that they were not interested in selling any of the property or leasing it for a theatre use, inasmuch as such a use would be incompatible with their development program. Any use on the property under prevailing circumstances would have to be R & D oriented.

m. The remainder of the property outlined in yellow on Exhibit "A" is generally shown by the numbers 1 and 8. This property is owned by Burlington Northern, Inc. I spoke with Dick Stafford in the real estate department of Burlington Northern, Inc. He indicated to me that he was authorized to speak on behalf of the company. He further indicated to me that corporate policy and financing dictates that all rail served sites be exclusively reserved for rail user tenants. All sites identified by the numbers 1 and 8, the bulk of the property in question, are rail served and, thus, would not be available for sale or use to a movie theatre or any kind of business catering to a retail market.

6. On June 3, 1982 counsel for Playtime Theatres and Kukio Bay Properties, Inc. gave me a map prepared by David Clemens that added additional area to the area already researched by me. Attached hereto as Exhibit "C" is an approximate outline, on a larger scale, of the

depicted area. Based upon current tax records, I determined the following:

- a. The area cross-hatched on Exhibit "C" is owned by Burlington Northern, Inc. and is not available for a theatre use for the reasons set forth in paragraph 5(m) hereof.
- b. The area double cross-hatched in the lower right hand corner of Exhibit "C" is part of the Koll Business Center and is not available for the reasons set forth in paragraph 5(d) hereof.
- c. The area identified by the number 1 is owned by Metro Industrial District No. 1. I did not research this area further other than to note that a drainage district runs through the center of the property for its entire length which limits its usability; and further, that the property has no road access.
- d. The property identified by the number 2 is owned by Mildred M. Summers and is vacant land. I could not locate Ms. Summers in the phone book or through directory assistance or other available directories.
- e. The property identified by the number 3 on Exhibit "C" is owned by James F. Harper and James W. Tripp. I was able to learn that the property has been sold but was presently in foreclosure and the rights of the respective parties would not be clear until perhaps later this month. Mr. Harper indicated that they would consider selling a portion of the premises for a theatre use, but they could not state a price nor offer any assurance that they would be able to recover the property in the foreclosure proceedings. Additionally, this property does not have access from any through street.
- f. The area identified by the number 4 on Exhibit "C" is owned by Mobil Oil Company and is developed with a tank farm. In my judgment, Mobil would not lease or sell this property because of the extreme difficulty and expense of relocating it. For this reason and

because of time constraints, no further investigation of this property was made.

- g. The area identified by the number 5 on Exhibit "C" is owned by Martin & Howard Seelig. Howard Seelig indicated that they were not willing to sell just a portion of this 12 acre site in order to accommodate a theatre.
 - h. The area identified by the number 6 on Exhibit "C" is owned by the City of Renton. I was advised by counsel for the plaintiffs that during his deposition, Mr. Clemens indicated that it was unlikely that the City of Renton would agree to a use or sale of its property for use as an adult motion picture theatre. Accordingly, I did not consider this site further.
 - i. The area marked with the number 7 on Exhibit "C" is owned by Metro and for the reasons stated in paragraph 6(c) and 5(a), is probably not available for use as a theatre site.
7. Attached hereto as Exhibit "D" is a map on which I have approximated the remaining locations shown on the map attached to the affidavit of David Clemens dated May 26, 1982.
- a. The area marked with the number 1 on Exhibit "D" is owned by Perry Brothers, Inc. and is built out as a rail-served warehouse facility and would not be suitable for a retail theatre use.
 - b. The area marked with the number 2 on Exhibit "D" has two ownerships. The corner piece consists of approximately 0.84 acres which is owned according to the tax records by Ray Mack, Inc., whose address is listed as a Renton post office box. I was not able to locate the owner through any available directory. This parcel is too small to accommodate the needs of the plaintiffs which is approximately 1.25 acres.
 - c. The remainder of the property identified on Exhibit "D" is part of an extremely large shopping center prop-

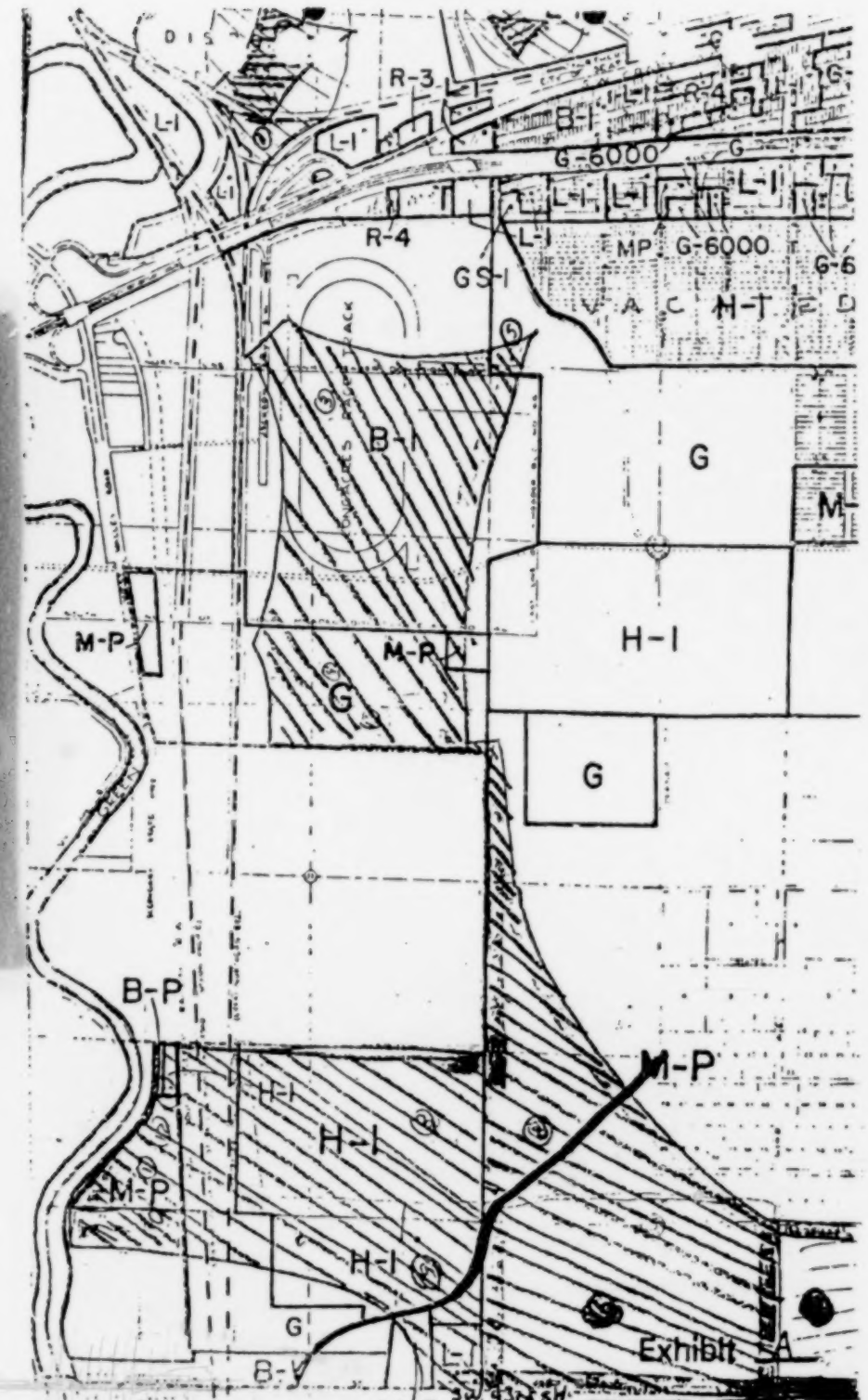
erty, whose prime tenant is a Payless Drug Center. The entire parcel is developed as a shopping center with paved parking. I was not able to locate the owner of the property who is identified in the tax records as Mission, Inc., with a Portland address.

In my experience as a real estate broker, I have never seen the owner of a developed shopping center property sell off or lease any extra parking area to an adjoining property owner. Because of changing zoning requirements for parking, any such sale or lease could potentially cripple future expansion or redevelopment of the site.

8. In my professional opinion as a real estate broker and based upon my experience and training in the commercial real estate field; and based upon my experience in attempting to negotiate for developers and purchasers for property sites that they seek to acquire from existing owners, the sites identified on Exhibits "A", "B", "C" and "D" as potential locations for an adult motion picture theatre, with the few exceptions noted, are not currently available, nor is there any reasonable likelihood that these sites will become available for such a use in the foreseeable future.

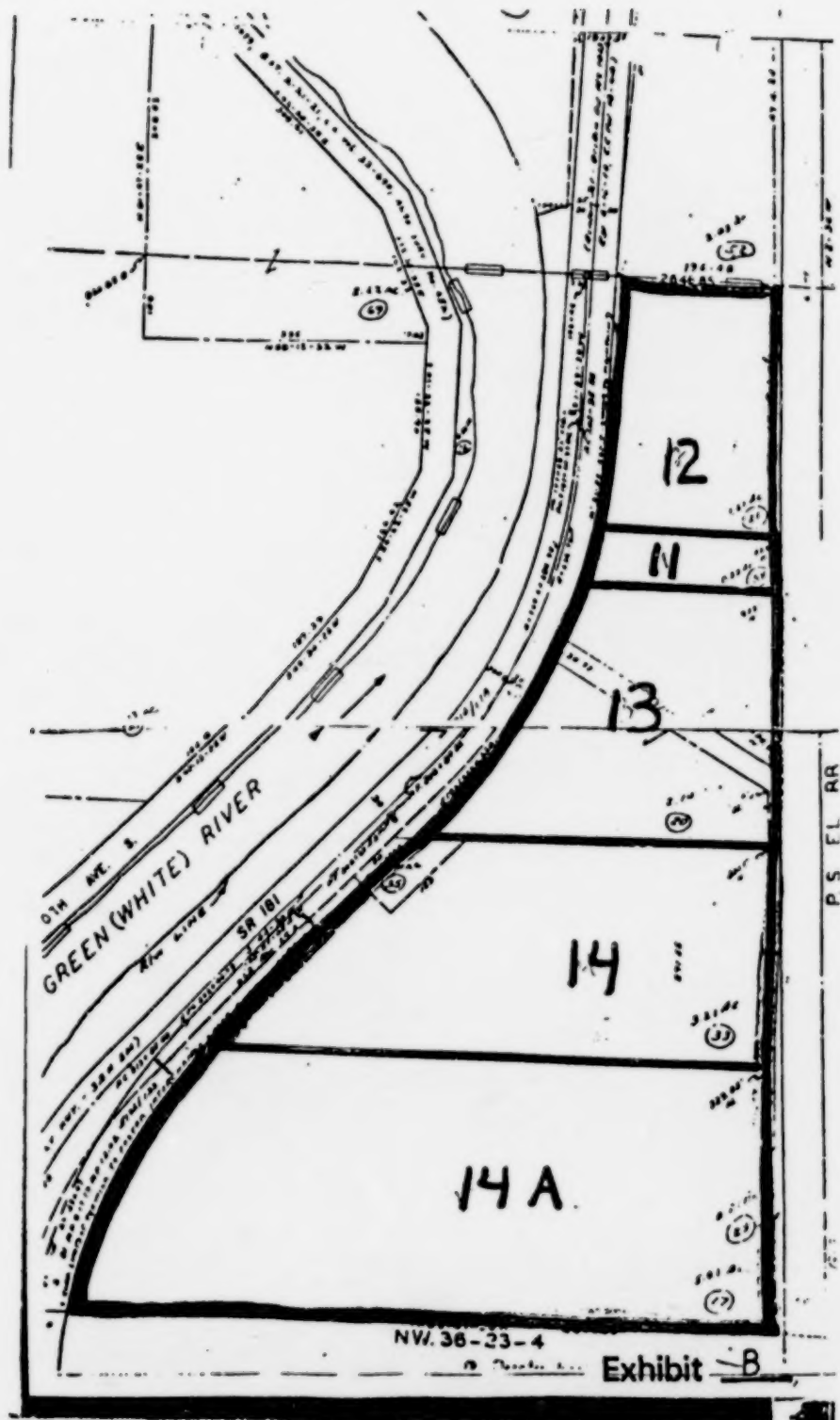
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[EXHIBIT A]

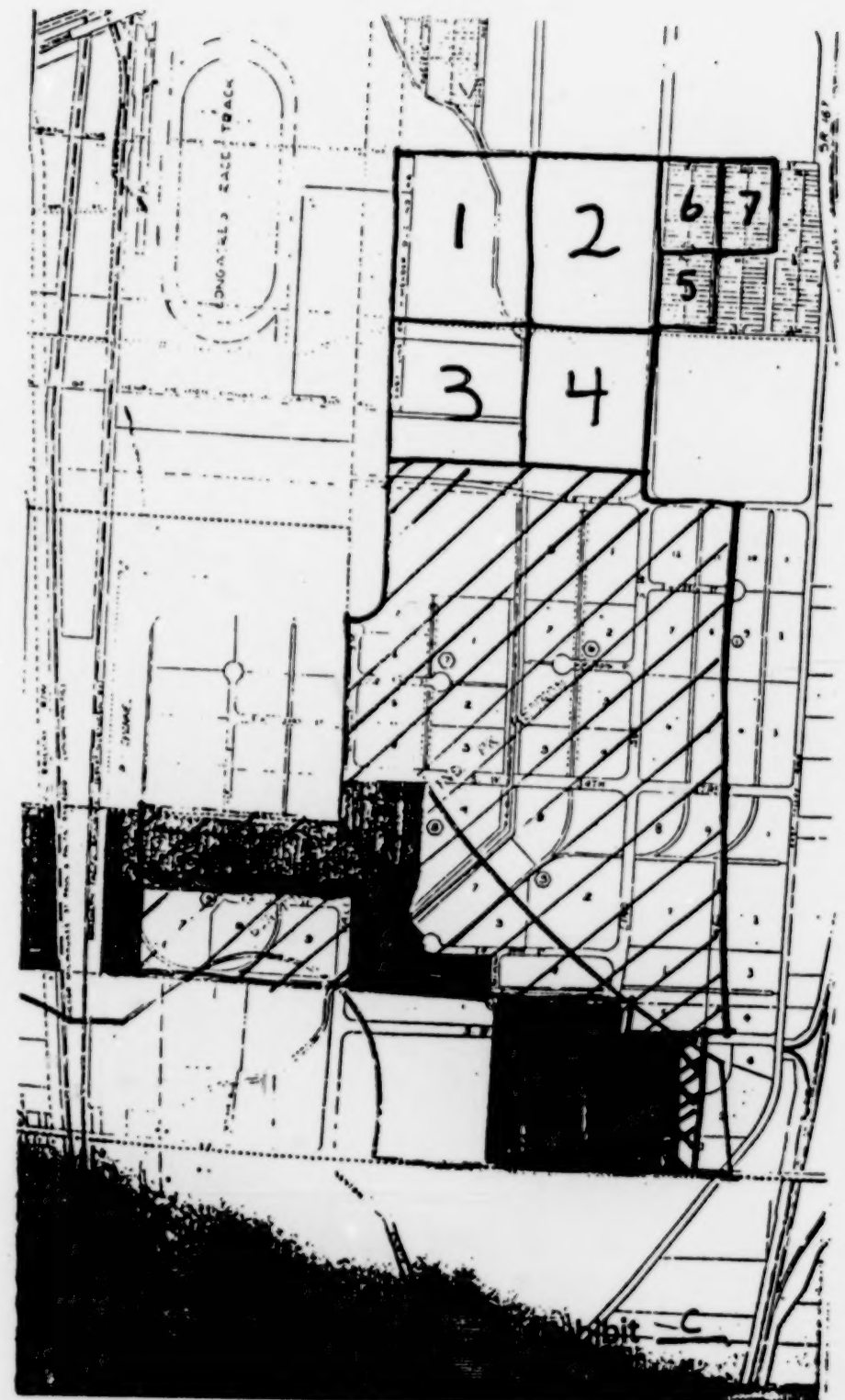


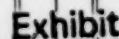
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[EXHIBIT B]



[EXHIBIT C]





No. C82-59M

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs,

VS.

THE CITY OF RENTON, *et al.*,
Defendants.

No. C82-263

THE CITY OF RENTON, a municipal
corporation,
Plaintiff,

VS.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

AFFIDAVIT OF ROBERT F. BOND

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Robert F. Bond, being first duly sworn upon oath,
deposes and says:

1. I am presently employed by Sterling Recreation Organization, a Washington corporation, and have been

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so employed for the past 23 years. Sterling Recreation Organization has been engaged in the exhibition of motion picture films in the state of Washington since approximately the turn of the century. Sterling Recreation Organization presently does business in the states of Washington, Oregon, California, Arizona and Colorado, and operates general release motion picture theatres, thirteen radio stations, a number of bowling facilities, cable television facilities, and serving as landlord for many retail business establishments. Within the state of Washington, Sterling Recreation Organization has approximately 75 motion picture theatre screens devoted to the exhibition of general release motion picture film fare.

2. In connection with my employment at Sterling Recreation Organization, I am the Director of theatre operations for the state of Washington. One of my functions in that capacity is to assess the viability of proposed theatre locations for purposes of acquisition and/or expansion of existing facilities.

3. In assessing the viability of a potential theatre location, there are two primary concerns, i.e., visibility and accessibility. An ideal location involves one that is highly visible from major arterials or freeways and, in addition, is readily accessible from those arterials or freeways, once the theatre location has been identified. In conjunction with these primary factors are a number of equally important additional considerations. A theatre must be located in a people oriented environment that has regular nighttime traffic and complimentary businesses such as fast-food outlets and restaurants. A theatre location must be a place that people are willing to go in the nighttime and which provides easy parking and is generally a focal point of nighttime recreation activity.

4. Attached hereto as Exhibit 1 is a map provided to me by counsel for Playtime Theatres, Inc. and Kukio Bay Properties, Inc., which I was advised was attached to the Affidavit of David R. Clemens and which depicts those

areas within the City of Renton where an adult motion picture theatre may locate. I personally went to the City of Renton on June 11, 1982 and drove by all of the locations indicated; and observed them for purposes of testing these locations against the criteria which we use at Sterling Recreation Organization for determining a viable theatre location.

5. With the exception of the one location circled in red on Exhibit 1, all the areas shaded in black are located in warehouse areas, light manufacturing areas, rail served manufacturing warehouse areas, or business industrial park areas, which are totally unsuited for use by a retail/recreation oriented business such as a motion picture theatre. None of these areas possessed any of the qualities which we look for when seeking to locate a motion picture theatre. In fact, most of these areas were so remotely located in relation to normal arterial traffic through the City of Renton that accessibility was difficult and confusing. In addition, none of these locations was near any area enjoying even minimal nighttime activity.

6. In summary, all of the area shaded on Exhibit 1, with the exception of the area circled in red, was, based upon the criteria that we use for theatre site selection, totally unsuited for a theatre use. In those areas, I did not see any place where people would want to go to recreate.

7. The location circled in red on Exhibit 1 is presently built out with what appeared to be relatively new Burger King and Shakey's restaurants. The site itself appears to meet most of the criteria which we use for assessing the viability of a theatre location; however, its size may be too small to accommodate the parking necessary for such an operation. The physical site of the property appears only sufficient to accommodate the theatre building itself and not necessary and required parking. However, the site is bounded by the parking area of a shopping center

whose primary tenant is a Payless drug store. In order to provide sufficient parking for the theatre, it would be necessary to obtain the right to use the shopping center parking for additional or required theatre parking. It has been our experience at Sterling Recreation Organization that even if this particular site could be acquired, it is unlikely that you could work out a parking arrangement with the shopping center owner which would allow you to go forward with a theatre development on that site.

* * * *

[The map that would otherwise appear here is a duplicate of the map that is printed at JA 215 and, therefore, has been deleted.]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATRES, INC., a
Washington corporation, *et al*,
vs. *Plaintiffs*,

THE CITY OF RENTON, *et al*,

Defendants.

TRANSCRIPT OF THE TESTIMONY OF JIMMY JOHNSON and DAVID R. CLEMENS, * * * had in the above-entitled and numbered cause in the above-entitled court before the Honorable PHILIP K. SWEIGERT, United States Magistrate, June 23, 1982, at the United States Courthouse, Seattle, Washington.

APPEARANCES

On behalf of the Plaintiffs:

Mr. Jack R. Burns
and

Mr. Robert E. Smith
Hubbard, Burns & Meyers
10604 N.E. 38th Place
Suite 105
Kirkland, Washington 98033

On behalf of the Defendants:

Mr. Lawrence J. Warren
and

Mr. Daniel Kellogg
Warren & Kellogg
100 S. Second St. Building
P.O. Box 626
Renton, Washington 98055

[3] PROCEEDINGS

THE CLERK: The Court calls C82-59M, Playtime Theatres, Inc., versus City of Renton.

* * * *

JIMMY JOHNSON

Called as a witness on behalf of the Plaintiffs, having been duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: My full name is Jimmy Johnson. Last name is spelled J-O-H-N-S-O-N.

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Johnson, are you affiliated with any organization, corporation or business entity that has as its chief responsibility the acquisition of property for adult motion picture theaters?

A Yes, I am.

Q What is the name of that entity, sir?

A Walnut Properties, Inc.

Q What state is that a corporation in?

A California.

Q And, sir, where do you reside?

[4] A Los Angeles.

Q How old are you, sir?

A 32.

Q How long have you been employed in Walnut Properties?

A A little over 14 years.

Q Sir, what is your present capacity with that organization?

A I oversee theater operations and publicity and advertising for the theaters and other entities that the corporation has.

Q Now, in overseeing theater operations, what relevance does that have, if any, with the acquisition of new theater properties?

A Could you run that by me again?

Q Yes. What relevancy does the theater overseeing operations have to the acquisition of new theater properties?

A Well, the operation of theaters in watching, you know, the daily grosses and the business that you're doing is related to any new locations that we were about to acquire. We can tell, you know, what is good and what is not so good, what is bad.

Q Sir, how many theaters do you oversee at the present time?

A 33.

Q And where are they located geographically?

A From Sacramento to San Diego, California.

Q Now, how long of the 14 years you've been working for [5] Walnut Properties have you been in management?

A 12.

Q Do you have any particular educational background that qualifies you to do the kind of work you're doing?

A Other than cinema classes, no. Basically it's all been on the job training and experience, practical experience.

Q Sir, do you belong to any organizations that adult exhibitors and/or producers may belong to?

A Yes, I do.

Q And what organizations are they, sir?

A The Producers Association of Los Angeles and the Adult Film Association of America.

Q Have you ever held any office in either of those two organizations?

A Not in the Producers Association, but in the Adult Film Association I have.

Q Approximately how many members are there in the Adult Film Association?

A Approximately 300 members.

Q Composed of what, sir?

A Producers, distributors, and exhibitors of adult motion pictures.

Q Do you have occasion to have any kind of meeting with regularity?

A Yes.

[6] Q How often?

A The Producers Association, which is comprised of producers and distributors, meets once a month in Los Angeles, and the Adult Film Association meets three times a year for board of directors meeting and once a year for a convention.

Q And do you attend those meetings?

A Yes.

Q Are they all located in California?

A No. They're all over the United States.

Q And do you have any kind of work seminars and programs having to do with operation of theaters at these meetings?

A Yes. We've had seminars on operation of theaters, on advertising. Generally seminars on everything that makes up the business.

Q In connection with your work, sir, as the overseer of theater operations, do you have occasion from time to time to talk to your various attorneys concerning the operation of the business and zoning and business licenses, and such?

A Yes, I do.

Q And generally how many different attorneys do you deal with?

A Quite a few. I've talked with attorneys all over the United States regarding, you know, adult film fare and I try to keep up with, you know, zoning ordinances in the [7] state of California where it directly affects us. And so I deal with, oh, six, seven, eight, different attorneys.

Q Sir, Do either Mr. Burns or myself represent you or your organization in any way?

A No.

Q Have we ever?

A No.

Q Sir, when is it you were first contacted about the possibility of testifying in this matter?

A Approximately two weeks ago.

Q And by whom were you contacted, sir?

A I was contacted by Mr. Forbes and by yourself, Mr. Smith.

Q And what were you requested to do, sir?

A I was requested to come to Seattle and look at locations, possible locations, for adult motion picture theaters.

Q Now, sir, based on your experience and background and your dealings with other professionals involved in the operation of adult theaters, do you feel you have any sense of what it takes to locate an adult motion picture theater?

A Yes, I do.

Q Would you tell us the criteria that you perceive are relevant and important to you and to others in the business of operation of adult theaters?

[8] A There's two main factors for an adult theater or motion picture theater, and that is to be in a location that is easily accessible by major streets and in a high traffic area where you have a lot of walk-by traffic, drive-by traffic. These, I think, are the two most important factors. And to have, additionally to have other retail businesses around you that draw customers.

Q All right, sir. Now, when was the first time you saw the locations in question here in the city of Renton? We're talking now about where the theaters that are owned by Playtime, operated by Playtime are currently located.

A In March.

Q Of what year, sir?

A 1982.

Q Now, did you have occasion to do an eyeball inspection since that time?

A Yes.

Q And when was that, sir?

A That was last night.

Q Would you tell the Court briefly how much time you spent and what it was you did last evening in terms of an eyeball inspection?

A Well, I was taken last night to the locations—

Q Which locations?

A I was taken to the proposed locations where an adult [9] theater could locate in the city of Renton.

Q Was Mr. Burns with you?

A Mr. Burns was with me and Mr. Forbes was with me.

Q Mr. Burns explained to you by some showing of a map, or something, the locations where adult theaters were allowable in the current ordinances in the city of Renton?

A He did both. He showed me by map and he showed me—because we drove all around the area, and pointed each individual location out.

Q After you looked at each individual location, did you have a feel as to whether or not those areas which are zoned for an adult theater or in which an adult theater may be able to be moved, would any one of those locations be a viable entity for that kind of program?

MR. WARREN: I object to the question and the line of questioning now, Your Honor, as it now relates to an attempt to assert the rights of third parties. We're here on Renton and Roxy's Playtime Theatres complaint that they're not able to operate their theaters within the area where they want to locate them, and now they're saying, well, we're going to assert something that maybe could have happened, and it's not the question that's before the Court.

THE COURT: Well, it seems to me what he's asking is he's trying to lay foundation for [10] this gentleman's opinion as to the sites that he was shown, and so forth, and their feasibility for the purposes of adult entertainment theaters. If the question were rephrased and based

on a foundation that ties it up with the exhibit, the maps and so forth, and then ask him for his opinion, then his number of years overseeing the location of this kind of entertainment activity, I think there's probably a basis for him to give an opinion, if that's what we're getting at.

But it seems to me you can rephrase the question and ask him whether he's got an opinion and what the opinion is.

Q (By Mr. Smith) Let me ask you, Mr. Johnson: how many different geographical sites did you visit last evening?

A How many different geographical sites. I think—would this make it easy? I visited every location that was on the map outlined in green.

Q Did you go to an industrial park area?

A Yes. There were what I would consider two basic areas. There was an industrial or light manufacturing area and, then, there was another area that we went by that was developed with retail businesses.

Q Let me ask you: in addition to the criteria that you've already enunciated for us, how much land is necessary to establish a 400-seat theater including parking?

[11] A In Seattle, I do not know. I don't know what the requirements are for parking. I don't know what the ratio is, so many seats per parking space. That I would not know. But, you know, in general terms, you need a good amount of space to put in a 400-seat theater and parking.

Q Now, did you have occasion to see a location that had a Shakey's?

A Yes, I did.

Q Would you tell us about that location and why in your opinion, if in your opinion it was not viable, why not?

A Well, I saw a location with a Shakey's Pizza on it and a location with a Burger King on it. Both buildings appeared to be relatively new. They were at the edge of

a shopping center. And if those properties could be acquired and a 400-seat theater could be put in there, I would think that would be a viable location for, you know, an adult theater.

Q Was there any other location, of all the ones you looked at last evening, other than the one you just identified, which would be a viable location based on your background in your opinion?

A No, sir, not a one.

Q Would you tell us why not, sir?

A The areas that we visited, there were vacant lots, out at the edge of town. There were parcels of land with railroad [12] spurs on them. There were parcels of land with storage tanks for fuels. I assume they're for fuels. There were areas that were developed with warehouses or light manufacturing. And those were primarily the only things that were out in that area. In fact, they were the only things out in that area.

And what you would have out there is people coming into that area during the day, people who worked there everyday. At nighttime there's nobody out there. So you lose your high traffic area, you have nobody going down the street. I'm not sure that they would go out there. It was pretty dark out there at night.

And in the exhibition business you must rely on movie posters, you must rely on marquees or walk-by and drive-by traffic in addition to your advertising. That's a very important part of advertising. And out there you just don't have it.

MR. SMITH: No further questions of the witness at this time.

MR. WARREN: Your Honor, may it please the Court, may I approach the exhibits?

THE COURT: Absolutely.

[13] CROSS-EXAMINATION

BY MR. WARREN:

Q Mr. Johnson, do I understand it correctly that you've been to the locations that are shown on these two exhibits just the one time last evening?

A Yes, sir.

Q And did you note that a roadway that is in the area located at the bottom of the map was torn up?

A Yes, sir.

Q And do you have any knowledge as to whether or not that roadway carries a significant amount of traffic when it's not torn up?

A No, I wouldn't. I know that there were some, appeared to be homes, a few homes on that street.

Q Did you go down the freeway that's known as the Valley Freeway to get to this area, do you know?

A I know that we got off of a freeway and started at one end and went down the street, all the way around, and then through the area that was under construction, and, then, back around.

Q Could you not see from most of the locations that you were discussing one or both freeways that are shown on the map?

A Yes. I know that the freeways were close by.

Q With some sort of a reasonably sizable marquee, would it [14] be possible, then, for these locations to be readily identifiable as adult motion picture locations from the freeways?

A I don't know how big of a marquee you would be talking about. I imagine that it would have to be pretty big.

Q Did you also see the Renton and Roxy Theater locations?

A Yes, I did.

Q And do you have any idea what the traffic is like on the street that runs in front of those on the weekend?

A I have never seen those locations on the weekend.

Q Did you have an opportunity to view the number of shops, and so forth, on the street that were open in the evening?

A I know that there were shops in the area and there's automobile dealerships. I couldn't honestly tell you how many of the businesses were open.

Q Is the number of businesses that are open in the evening, is that not a function of how desirable a location might be?

A Yes.

Q Is not also the availability of parking a consideration?

A Very important.

Q Do you know anything about the number of parking spots that are available on site for the Renton or Roxy Theater?

A On site. I do not. I just know that there is quite a bit of parking in the surrounding area.

[15] Q You say, "Quite a bit in the surrounding area." Could you—

A There's adequate.

Q In fact, is it not the case that there's a very few parking stalls on the street itself?

A I know that there's parking on side streets.

Q And is it not true that those side streets are largely residential streets?

A The area where I parked was not in a residential area, no. There was a business there.

Q Was the parking that you utilized public parking or was it in connection with a business?

A That I'm not sure. I think it was probably parking.

Q Do you have any knowledge as to whether that public parking might be restricted at any time during the evening hours?

A I have no knowledge as to that.

Q Do you have any knowledge as to the future construction plans for any streets in the locations that you viewed that you've identified as being in the green areas?

A No, I don't. Well, no. As far as street construction, no, I don't.

Q Are you familiar at all with the locations where Mr. Forbes enterprise operates his adult motion picture theaters now?

A Yes.

[16] Q Are you aware of the location at Point Roberts?

A Point Roberts, I have not been to.

Q Do you know where Point Roberts is?

A Yes, I do.

Q Do you know the fact that it's a community with a population of around 250?

A With a tremendous drawing power in the area.

Q From where?

A From Canada.

Q And that is how long away by car, do you know?

A It's quite a ways. I think it's like a 40-minute drive, or something.

Q Does that not put that theater in doubt in your mind as to an acceptable location?

A No, it does not. That theater does fine business, as does one in Seaview.

Q Is that a high traffic area; Point Roberts?

A I know that—I have not seen it. I have not seen the location, but obviously there's a high traffic area. The people are coming from somewhere because the theater does business.

Q Is that not the point, Mr. Johnson, that people will travel to locations that are somewhat inconvenient if they wish to view this type of motion picture?

A If there's nothing in the area at night, no. Absolutely [17] nothing. And the proposed locations, I'm not sure that there were street light. There was nothing out there open. Absolutely nothing.

Q Let me ask you this question: do you know what there is at night that draws people to Point Roberts outside of this theater that is operated there?

A No, I don't.

Q Did you limit your inquiry simply to those locations that are marked in green on the two maps that are on the board?

A I'm sorry. Did I limit my inquiry—you mean, did I rely on the information that those were the only locations available?

Q Yes.

A Yes, I did. This is what I was told and those were the areas that we looked at.

MR. WARREN: That's all the questions I have, Your Honor.

MR. SMITH: May I just have a moment, Your Honor?

THE COURT: Certainly.

(Short pause in proceeding.)

[18] REDIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Johnson, when you were being taken around and shown locations, you relied upon the host driving the automobile to point out the locations and telling you that these within those categories are locations where the city claims the adult theater to be located?

A Yes.

Q And you don't know whether it was just restricted to the green areas on Exhibit 8 and on the map, do you, sir?

A No. I'm simply relying on the information that was given me as to possible locations.

Q You looked at several very small locations in addition to the larger location, did you not, sir?

A Yes.

MR. SMITH: Thank you. No further questions.

MR. WARREN: Your Honor, we move to strike all of the testimony as now not being competent because we have no idea exactly what this gentleman has viewed,

the extent, the scope of it, or what he was told when he went on his view.

THE COURT: I won't strike the testimony, but I will say that the Court, on the basis of the testimony, is going to have an awfully hard time [19] figuring what he did see and what he didn't see.

I'll deny the motion.

MR. SMITH: We're willing to call Mr. Forbes who drove the car and can tell.

THE COURT: Thank you.

MR. WARREN: Your Honor, on that basis, when they call Mr. Forbes we're going to object because he was not amongst the witnesses that were listed in their denomination of witnesses, and the Court specifically said they're supposed to tell the other party who's going to testify.

THE COURT: That's absolutely correct. If he's not identified as a witness who was going to testify today, he won't testify.

MR. SMITH: But, Your Honor, on the other hand, counsel objects to the failure of the witness to be able to geographically impress on the Court the various areas, and this is something which—

THE COURT: I did not strike his testimony. His testimony stands.

MR. SMITH: I understand that. May I approach the witness, please, Your Honor.

THE COURT: Yes.

MR. SMITH: May I have this marked as an exhibit, please?

[20] THE CLERK: This will be Plaintiffs' Exhibit No. 9.

Q (By Mr. Smith) Mr. Johnson, I show you a map which has some area denoted in black on there and it says, "Areas where adult motion picture theaters are allowed by Ordinance 3526 and 3629." Do you see that, sir?

A Yes, I do.

Q Now, were you shown this map last evening?

A Yes, I was.

Q Did you cover each of the areas in black designated on that map?

A I'm sure that we did. I can only rely on my driver.

Q Were there two small areas in the northern part of the map, the larger map, that you viewed?

A Yes.

Q And you saw those two locations?

A Yes.

Q All right. And, then, you saw a larger series of locations?

A Yes.

Q And these were all covered last evening?

A Yes.

MR. SMITH: Thank you. We'll offer Exhibit 9, Your Honor, as the area covered by the visual inspection last evening by Mr. Johnson.

[21] MR. WARREN: We object to the characterization of that, Your Honor, because he couldn't identify exactly where he was either before or now.

THE COURT: To me he indicated he relied on the person he was with.

MR. WARREN: We don't have any objection to the document itself since I believe we put it in in the form of an affidavit by Mr. Clemens. So we can't object to the document itself.

THE COURT: You mean it's already in here?

MR. WARREN: It's already in here as an exhibit to Mr. Clemens' affidavit in support of our motion for summary judgment; the document they were just using.

MR. SMITH: But not as an exhibit in support of our motion for preliminary injunction, Your Honor.

THE COURT: I'll admit it for whatever it's worth.

MR. WARREN: We have no further questions of this witness, Your Honor.

THE COURT: I assume he may step down.

MR. BURNS: Yes.

[22] Your Honor, that is all the evidence we have to offer at this time.

THE COURT: All right.

MR. WARREN: Your Honor, to assist the Court in getting the exhibits in, and for the record, that the city is going to offer, we'd like to call Mr. Clemens to the stand.

THE COURT: Was he listed?

MR. WARREN: Yes.

THE COURT: All right, you can do so.

Step forward and be sworn, please.

DAVID CLEMENS

Called as a witness on behalf of the Defendants, having been duly sworn, was examined and testified as follows:

MR. WARREN: Your Honor, with the Court's permission, we'd like Mr. Clemens to carry his exhibit over to the board with him so that they could be identified from there.

THE COURT: Would you rather have him testified from there?

MR. WARREN: Largely from there, yes.

THE COURT: That's fine, unless [23] anybody has any difficulty hearing him. If you would speak up. You won't have the benefit of a mike, but nobody's been speaking into it, anyway.

THE WITNESS: I'll try, Your Honor.

DIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Clemens, can you identify for the Court and explain what City's Exhibit—I believe labeled 1-A is?

THE COURT: Has it been marked as 1-A?

THE WITNESS: Yes.

THE COURT: That's backwards, but that's all right. Leave it as it is.

Q (By Mr. Warren) Could you identify the exhibit, please?

A Your Honor, the exhibit is a base map of the city of Renton at 1 inch equals 800 feet. On it identified in a red dashed line is the city limits of the city of Renton. Superimposed upon that map is a first overlay consisting of a light green, sort of a lime-colored, area which we have identified as commercial and industrially zoned property within the city of Renton.

The second overlay is a darker green color, sort of a leaf green color, that identifies the areas in which the city of Renton ordinances related to the location [24] of adult motion pictures, the areas in which adult motion picture theaters would be allowed.

On the darker green area is a dotted line surrounding two small areas which are currently zoned G-1, which is a holding classification. They are not presently zoned business or industrial. However, the comprehensive plan identifies both of these areas as being potentially zoned for those purposes.

MR. SMITH: Your Honor, we would object to any testimony and move to strike the testimony about the potential use having to do with an ordinance which is not yet in effect. We were dealing, Your Honor, with the initial ordinances passed. As Mr. Burns set out, there have been two additional ordinances, the last of which we heard about this past Monday. We're talking about an ordinance which really isn't before the Court.

THE COURT: Are these areas that are covered only by that ordinance or would they also be of the same category under the original ordinance?

THE WITNESS: This identifies the additional areas from the areas that were allowed under the original ordinance. Portions of this area, generally the southwesterly corner, were areas allowed by the original ordinance,

and the additional areas northerly were allowed by the amendments which the city council has adopted.

[25] THE COURT: Well, I'm going to hear the testimony. I have some question about its relevance, depending on whether or not you're correct and I deem you correct on the matter, that is, what is before the Court at this time, but in the interest of getting everything in the record, I'm going to go ahead and hear the testimony in any event.

Q (By Mr. Warren) Mr. Clemens, would you explain to the Court how a parcel would be included or eliminated from the dark green area on Exhibit 1-A? Excuse me, let me move on to the next exhibit that we've marked so we'll get them all identified.

A Your Honor, this is identified as Exhibit A-2.

Q Is that simply a larger view of the first exhibit?

A Yes. The map's scale in this case is 1 inch equals 400 feet rather than the prior 1 inch equals 800 feet, and it depicts the same information except that it excludes the other areas that are zoned business or industrial.

MR. WARREN: We'd offer these first two exhibits, Your Honor.

THE COURT: It excludes what?

THE WITNESS: It excludes the overlay which identifies the areas—

THE COURT: The light green?

THE WITNESS: Yes.

[26] THE COURT: It excludes the light green?

THE WITNESS: That's correct.

MR. WARREN: We would offer the first two exhibits, Your Honor.

MR. SMITH: We would object to the exhibits on the basis—

THE COURT: The same basis that you've mentioned?

MR. SMITH: Yes, Your Honor.

THE COURT: I'll admit them subject to your objection and to my rulings on that objection.

Q (By Mr. Warren) Mr. Clemens, could you now identify the third exhibit?

A Your Honor, this exhibit, it's identified as Exhibit A-3, it's an aerial photograph of the area generally in the southwest portion of the city of Renton and identified on this map is a yellow line indicating the areas in which the adult entertainment use, the adult theaters in question in this proceeding, would be allowed.

It has a green and white dashed line which identifies areas that are not presently zoned for that purpose, but comprehensively planned for that purpose.

It identifies in an orange line street improvements which the city of Renton currently has under contract [27] and it identifies with a light dashed line the city limits of the city of Renton.

MR. WARREN: We'd offer this exhibit, Your Honor.

MR. SMITH: Same objection, Your Honor.

THE COURT: All right, it will be admitted provisionally.

Q (By Mr. Warren) Mr. Clemens, the fourth exhibit?

A The last exhibit is identified as A-4. It is a aerial photograph of the downtown portion of the city of Renton. Located generally at the center of the photograph are the parcels of property on which the Renton and Roxy Theaters are located.

Also identified on the overlay are surrounding uses such as churches, single and multiple family residences, and by an orange line a distance of 1,000 feet from the Renton Theater.

MR. WARREN: We'd offer Exhibit 4.

MR. SMITH: Same objection, Your Honor.

THE COURT: Same result. It will be admitted provisionally.

MR. WARREN: Your Honor, I'm sorry [28] I misunderstood that objection. I know the Court has indicated it's provisional.

THE COURT: Does this have anything to do with the difference between the two ordinances?

MR. WARREN: No, Your Honor. It shows the location—

MR. SMITH: It certainly does.

THE COURT: Wait just a minute.

MR. WARREN: It shows the present theaters' location and the 1,000 foot prescription.

THE COURT: Didn't the original ordinance have a greater restriction?

MR. WARREN: Yes, a mile from schools.

THE COURT: Does this indicate the distance from schools?

MR. WARREN: This indicates simply the least distance that was prescribed in the ordinance, the 1,000 feet, and shows a number of uses within that area.

THE COURT: What I'm asking is—

MR. WARREN: It doesn't specifically designate how far a mile is from schools, no.

THE COURT: Would this map be the same if we were talking only about Ordinance No. 3529?

[29] MR. WARREN: In my opinion, it would be. We would have prepared it the same way.

THE COURT: Well, perhaps Mr. Clemens is the one to indicate that.

THE WITNESS: Your Honor, the only difference between this exhibit, which you see before you, and an exhibit which would identify the prescriptions of the original ordinance would be that at some point about here would be another orange line, which would identify 1 mile distance from the Renton Theater.

The scale of this aerial photograph is approximately 1 inch equals 74 feet. So that we would be a number of feet off of this photograph before we would reach 1 mile.

THE COURT: What I'm asking you is: if this exhibit had been prepared without going as far as you've indicated, would there be anything on it that would be

different if we were only talking about it in view of the enactment of 3529?

THE WITNESS: No, sir.

THE COURT: It would be identical?

THE WITNESS: I believe it would be.

THE COURT: I'll admit it, then.

MR. WARREN: Your Honor, if I may [30] approach the Clerk, we have two additional ordinances that are self-proving documents, certified copies from the city of Renton.

THE COURT: What do they deal with, counsel?

MR. WARREN: Your Honor, there is a considerable amount of the brief of the plaintiff that deals with whether or not theaters are permitted use in the business zone within the city of Renton. The first one is simply a certified copy of the building permit and additional documentation from the city of Renton with respect to a theater that is located within the business district of the city of Renton. This will be prior consistent statement and a matter of policy that the city has adopted for some time.

MR. BURNS: Your Honor, we have the zoning code in front of the Court. It provides what uses are allowed in the B-1 zones and more intensive use zones. We have Mr. Clemens' deposition testimony which has been offered as an exhibit, and Exhibit No. 6 within that deposition testimony Mr. Clemens has testified that there is no written administrative policy or guideline that exists within the city of Renton that says that a theater use of any sort is permitted within the B-1 zone. The only place that that written administrative policy [31] exists is in the pleadings of the defendants in this case.

We don't think that that rises to the dignity to show that a theater is permitted use within the B-1 zone. Mr. Clemens has testified that it is not on its face and there's no written policy. Mr. Clemens has testified that it is, but we're concerned with what the zoning ordinance says

on its face and its administrative written interpretations, if any, exist, not what they claim today.

THE COURT: I understand. I'll overrule your objection and admit it.

MR. WARREN: Your Honor, Exhibit No. A-7, I suppose, does not technically need to be admitted as it was contained in an affidavit of the City Clerk, Dale Mead, that was submitted to this Court before we brought any additional copy of our exhibit list to assist the Court in any fashion.

THE COURT: It's a part of one of the affidavits?

MR. WARREN: Yes, it is.

THE COURT: I don't see any necessity for it.

MR. WARREN: I just wanted to make sure the record was complete.

As the last exhibit, Your Honor, we have had [32] marked, and this is a document for Mr. Clemens' identification, along similar lines with Exhibit No. 5, and I would leave to Mr. Clemens to identify exactly what this document is.

THE WITNESS: Your Honor, the document is a list of uses that are not specifically identified within the B-1 zoning district which the city of Renton has issued building and business licenses for extensively throughout our business district. If you will note the preamble to the B-1 districts, which is 4-711, the district states a list of uses and other similar uses. The listing that I have prepared is a listing of uses that would fall in that general category.

MR. WARREN: We'd offer Exhibit 6, Your Honor.

MR. BURNS: Your Honor, we have the same objection with respect to this exhibit as we did to B-1. It doesn't have any probative value with respect to the ordinance on its face or has it been authoritatively construed in any sense of the word.

THE COURT: What's the exhibit number?

MR. WARREN: A-6, I believe, Your Honor.

THE COURT: A-6 will be admitted.

[33] Q (By Mr. Warren) Mr. Clemens, using your illustrative exhibits that are on the board, particularly Exhibits A-1 and A-2, if I have the numbers correct, can you explain to the Court how a parcel of land would be included or excluded from the dark green area that you have on that map?

A The methodology that was used in preparation of this map was to identify the uses listed in the ordinance and identify the distance from those uses as described in the ordinance and, if a portion of the parcel is touched by the prescribed limit, then the entire parcel is excluded. These parcels of property are parcels of property which are exclusively not touched by any of the prescribed limits in the ordinance.

Q Were there any large parcels that were touched only partially by the arc?

A Yes, there were any number of them.

Q Is there any simple administrative procedure that one could use to free up portions of those large parcels?

A Yes. A platting procedure in the state of Washington under the short plat regulations could subdivide properties to allow additional areas from those identified on the map in the dark green color.

Q Mr. Clemens, have you prepared another overlay to these two exhibits that show other properties that would be [34] available through the short plat process?

A Yes, I have.

Q Do you have that with you?

(Short pause in proceeding.)

Q (By Mr. Warren) Mr. Clemens, do you have that on the right alignment?

A I'm going to have to align it a little better, but we're getting close.

Q Now, just so the Court understands, would you explain what the red areas are?

A Your Honor, this is Exhibit No. A-2 and shown on this map as an overlay in a red color are areas that would be available for adult motion picture theaters subject to

the platting of those properties and in some cases there may be a requirement for a rezone of the properties. But there are some of the parcels of property within the general area which would be allowable with the platting procedure.

Q Mr. Clemens, this is with respect to the permissible areas for Ordinance 3526 and 3629, is that correct?

A That's correct.

Q Have you tried to do a similar analysis on just the first Ordinance 3526?

A Yes. Many of the results would be similar. There would be additional parcel areas that would be allowable by a [35] platting procedure.

THE COURT: May I ask—maybe you misspoke yourself—what number did you give as the original?

MR. WARREN: 3526.

THE COURT: Was that right?

MR. WARREN: 29, I'm sorry.

THE COURT: I thought that was 3529. Maybe we ought to rephrase the question so the record is correct.

Q (By Mr. Warren) Mr. Clemens, did you try and utilize this same procedure with respect to the permitted uses under Ordinance 3529?

A Yes, I did, and the results were somewhat similar in that there were additional parcels that were identified, or additional areas which were identified that could be available for adult motion picture theaters by platting large parcels into smaller parcels.

MR. WARREN: Your Honor, just for the record, checking our files we believe that the numbers are completely out of hand. We have the first ordinance as 3526, the second ordinance 3629, and the third ordinance, which is the one submitted by means of an affidavit previously, was 3637.

THE COURT: I think somebody may [36] have mis-spoken themselves the very first time these were mentioned. I think you may be the culprit.

MR. BURNS: I think I am. I'm looking at my brief and I see that I identified the first ordinance 3526 in my brief. So, if I misled the Court, I apologize.

THE COURT: You did. Okay, apology accepted.

Q (By Mr. Warren) Mr. Clemens, could you now bring up—excuse me, you've already got it up there—A-2, and explain to the Court the heavy blue lines on that exhibit?

A Yes. The heavy blue lines on this map illustrate freeways or major arterial streets in the general vicinity of the areas that we have identified. This large blue line here is Interstate 405 running generally in an east-west direction.

The dark blue line here running generally in a north-south direction is the Valley freeway, SR 167.

At the west is the West Valley Highway, SR1—I'd better not use the number, but it is a state highway, the West Valley Road.

At the extreme south end of the map is a major east-west roadway, S.W. 43rd, it's identified in the city of Renton. It has a designation of South 180th in the city of Kent because our city limits abut at that point.

[37] Running in a north-south direction through the center portion of the map is a major industrial arterial, Lind Avenue, and a number of east-west streets, S.W. 41st, S.W. 39th, 34th and the East Valley Road. Again, an industrial arterial.

Q With respect to the next exhibit, Exhibit A-3 that has the orange lines on it, could you explain to the Court what roads would be improved under that?

A Your Honor, the city of Renton has two major roadway improvement projects going on simultaneously. The bottom of the map, this orange line, identifies S.W. 43rd Street improvements, which is taking generally a rural two-lane, nonshouldered roadway, which has served extensive traffic exceeding 20,000 vehicles per day for a number of years, and widening it to a four and five-lane

section to provide east-west access in a more acceptable manner and bringing the levels of service down to typical urban standards.

Also you'll notice this reverse capital F shaped orange line generally along the easterly portion of the map and this is the local improvement district No. 314 which is intended to improve the East Valley Road and construct S.W. 19th and S.W. 27th providing access to a number of parcels of property.

Q Mr. Clemens, with respect to S.W. 43rd, could you explain [38] to the Court what that road serves going both east and west along it?

A The area generally to the east of this aerial photograph is predominantly residential in character, the Souss (phonetic) Creek Plateau area that abuts the south-easterly portion of the city of Renton.

Generally to the west, to the immediate west, are industrial and commercial areas of the city of Tukwila and, then, immediately beyond those the residential areas of the Highline area of King County.

Q Could you locate for the Court generally where Southcenter would be?

A Southcenter would be approximately the same distance off of the map as the distance between Valley Freeway and West Valley Road again to the west. Approximately this location.

Q Mr. Clemens, going back to the prior exhibit, if you could, could you explain to the Court the access corridors to the property that has been identified on your exhibit in green and red?

A The available access to this area comes from each of the four major directions. From the south we have access by the Valley Freeway which extends to the city of Tacoma on the south.

On the north accessing from both east and west [39] is Interstate 405.

From the southwest we have access via the West Valley Road and the extension of 180th.

Q Could you show the Court if somebody was coming along 405 in an east or westerly direction, either way, how they would get to the property that is in the green?

A If you were going to an area in the northerly portion, I would probably come down Interstate 405, take the Rainier Avenue off-ramp to the intersection of Grady Way, make two lefts, the second left being Lind Avenue, and that would place you on the major industrial corridor passing through the entire area.

If I was coming from the east, or if I was coming from the same direction I was going to the southerly end, there's an easier route and that would be to take 405 to the Valley Freeway, take the Valley Freeway south to the first exit and enter the area immediately off of the freeway off-ramp at S.W. 41st Street.

Q How about a piece of property on the very westerly portion of the green?

A A couple of alternatives. From the west there's access off of the West Valley Road via Monster Road, and from the southwest at the intersection of S.W. 43rd and West Valley Highway.

Q Could you explain to the Court, again using those same [40] roads where one would have to go to get to the Roxy and Renton Theaters at their present locations?

A The theaters in question are located in approximately this location between Morris and Smithers Avenue South and South 3rd Street, which is this top blue line on the exhibit.

From the westerly direction, the easiest interchange is the Rainier Avenue interchange with 405, northerly through a number of traffic signals to South 3rd and then easterly along South 3rd to the theaters.

Q Mr. Clemens, if one is coming down 405, could you express your opinion, from your knowledge of the area, which of the locations, either in the green area or the Roxy and Renton, is the most accessible to traffic?

A My own opinion of the traffic situation is that from the east, because of the extensive distance between the

freeway off-ramp and the downtown area, I would believe that the area shown in green is actually more accessible time wise, although it would be slightly longer in terms of overall miles distance.

Q How about coming from the west?

A From the west the access via 405 would be equal to this point. The traffic congestion moving towards the center of town would certainly be greater than extending out into the area that we've shown in the green color. I would [41] believe that from the west that access to this area would be at least equal to, if not better on a time basis. Again it would be slightly more in terms of distance.

Q Just for the Court's information, could you please locate Longacres on the map?

A Yes. Longacres is identified on the map in this oval and the words "Longacres Race Track" is identified on the map.

Q Mr. Clemens, would you relate to the Court briefly, using the aerial photograph of downtown Renton, which I believe is Exhibit A-4, could you relate to the Court now using this exhibit as an example what the parking situation is like around the Roxy and Renton?

A The parking in the vicinity of the theaters is, to the best of my knowledge, all in private ownership of the businesses or residences in the area, with the exception of on-street parking. The only parking lot available is a public parking lot of the city of Renton located on Burnett Avenue South between South 2nd and actually South 5th.

This photograph is about one year out of date and this parking lot is now complete. So the parking would be located approximately a block and a half to the east and is public parking.

Q Mr. Clemens, is there any restrictions, to the best of [42] your knowledge, on the parking on Burnett during any evening hours?

A I don't really know.

Q Mr. Clemens, with respect to the traffic in front of the Roxy and the Renton Theaters, is there any unusual circumstances that occur on the weekends?

A Yes. For a number of years the city of Renton has had what has been called the "loop" which is an area where young people have tended to congregate, drive their vehicles around the one-way street loops, which consist of South 2nd going westerly and South 3rd going easterly. The city of Renton Police Department has had considerable difficulty dealing with the traffic congestion, people parking in off-street areas in the adjoining residential neighborhoods, and so on.

Q Is there any traffic control devices utilized on the week-end if this problem becomes severe, to the best of your knowledge?

A When the problem becomes very severe, South 3rd Street is sometimes blocked at Rainier Avenue, which is just off the aerial photograph, and no traffic is allowed except local business or residential traffic.

Q And South 3rd is the street that runs in front of the two theaters in question?

A That's correct.

[43] Q Could you point out to the Court the surrounding neighborhood of the Renton and Roxy Theaters and explain some of the labels that you have attached to the exhibit?

A The most immediate adjoining uses to both the Renton and Roxy Theaters are multiple family residential apartment units. In the case of the Roxy Theater, it's in the same building. In the case of the Renton Theater, it's in an adjoining building.

The next closest uses are a church and single family residential homes to the south. Another church. Actually two more churches. St. Anthony's Elementary School and its play yard.

And to the north there's an area of a variety of commercial uses and at South 2nd Street we reach Renton High School.

Q Are all the uses you've just described within the 1,000-foot limitation you've marked on your Exhibit A-4?

A That's correct.

Q Mr. Clemens, could I have you turn again to Exhibit A-1 for just a moment. Can you point out to the Court on that exhibit, or in all of the commercial and industrial zoned property shown on the light green, where the greatest acreage within the city that is undeveloped or in development at the present time might be located within the commercial and industrial zone?

[44] A Your Honor, with the exception of relatively small parcels, the area from approximately this point northerly or easterly are primarily developed, existing commercial development of various types.

From approximately this point westerly and southerly are areas that are currently undeveloped and in the process of transition to developed uses.

Q For the record, Mr. Clemens, could you explain where you were pointing so we make sure we understand on this exhibit?

A Okay.

Q Use words rather than gestures.

A All right. Commencing at the Interstate 405 and Valley Freeway interchange, which is identified on the map, and extending a line northwesterly to the city limits, that was the demarcation line that I was illustrating with my hand.

Q Most of the property that is developable is in what direction from that line?

A To the south and west from that line.

MR. WARREN: Thank you. That's all the questions I have, Your Honor.

MR. SMITH: If it please the Court.

THE COURT: Yes.

[45] CROSS-EXAMINATION

BY MR. SMITH:

Q On this exhibit, sir, I notice a green area right up here.

A Yes.

Q What is that?

A It is a separate tax lot within the ownership of the Pacific Car and Foundry Company.

Q What does that green designation mean?

A It means that it is within the area that an adult motion picture theater would be allowed.

Q I hand you an exhibit to your affidavit. Would you tell the Court where you've designated that on the map that you attached to your affidavit?

A It apparently failed to be included on this exhibit.

Q It failed to be included on the exhibit.

MR. SMITH: This is a map that's been previously introduced. It's part of the affidavit of Mr. Clemens in support of the motion for summary judgment.

Q (By Mr. Smith) So this area is not included, correct, in this affidavit and on this map?

A That's correct.

Q Would you take this down, and I want to ask you some questions about this particular exhibit. Do you know what [46] this map is, sir? Have you ever seen it before? It's marked Exhibit 8.

A This is a map that was prepared on the instructions of city attorney to be presented to yourselves for the purposes of the—or at the instruction of the Magistrate as the result of the deposition that was held earlier this year.

MR. WARREN: Your Honor, we're going to object to any testimony on this particular exhibit for two reasons. One, it was introduced in their case, not ours, and not subject to cross-examination, and also it's outside the scope of the direct.

THE COURT: I'll let him re-open his case. Go ahead.

Q (By Mr. Smith) You prepared this, is that correct?

A That's correct.

Q What are the areas in red designated here, sir?

A The areas in red are the illustrations of the distances from the uses protected by the original zoning ordinance. Was that 3256? I believe that's correct.

Q What you're saying is that these are the areas that were allowed in which an adult theater could be located; the areas within that marked red?

A Those are the prescribed limits from the protected uses.

Q And that parallels this first exhibit, which was introduced [47] over here? Is that not correct, sir, that which is marked Exhibit No. 1?

A Yes, I believe it does.

Q This is the exhibit that was brought into court about which you testified, is that not correct?

A Yes.

Q Now, what are these green areas that have been now denoted within the red area, sir?

A Those are the areas where the prescriptions of the Ordinance 3526 would allow adult motion picture uses.

Q Didn't you testify to the Court that the green areas in this larger map were the areas where an adult theater could locate?

A Yes, sir, I did, and I was wrong.

Q You were wrong?

A That's correct.

Q So at the time you testified here against the temporary injunction, you said all these areas were areas where a theater could locate, but you were wrong?

A That's correct.

Q And now you've taken another map and have taken the same areas that you said it was okay and you've delineated those even smaller now, have you not, sir?

A That's correct.

Q At least as to this ordinance, is that correct?

[48] A That's correct.

Q And then when the affidavit that you submitted with the map, you left an area out also, is that correct?

A That is correct.

Q All right.

MR. SMITH: Your Honor, most of the questions I now will be asking will be direct, if he wants for his convenience, to return to the witness stand.

THE COURT: All right. It may be easier if you do that.

Q (By Mr. Smith) Sir, you were asked today by counsel for the city to discuss traffic problems in connection with the West 3rd Avenue area, is that correct?

A West 3rd? I'm not familiar with that street.

Q Well, the area where the Renton and Roxy are located.

A South 3rd.

Q South 3rd. Is that correct?

A Yes.

Q Were you called before the city council and asked to give that same discussion?

A We discussed traffic problems so many times, I don't know whether it was in regard to this matter.

Q Do you have any independent recollection, as you sit there, of having been called before the city council in connection [49] with the adult entertainment ordinance and discussing the traffic flow and traffic patterns and traffic problems?

A (Pause) I can't recollect specifically either way.

Q It doesn't strike you as you having done it, having appeared, does it?

A I simply can't tell you either way.

Q Okay. Now, let me ask you in connection with the police—you were asked the question whether or not when the traffic problems became very severe, did the police do anything in order to control traffic, and I think you said they blocked off part of the 3rd Street, is that correct?

A That's correct.

Q And you said it would only then let, what, business use in and residential?

A That's correct.

Q Which would mean if somebody were going to the Renton or Roxy Theater, they would be allowed into the area, is that correct?

A Yes.

Q So the blocking off of that area on weekends really doesn't have anything to do with this matter, as far as you're concerned, does it?

A It certainly would make it more circuitous because the [50] route that you would take would not be along South 3rd.

Q Well they could go through there. I mean, a potential patron could go there and just say where you're going, couldn't you?

A Yes.

Q And would be allowed through by the police, isn't that correct?

A On a different route.

Q On a different route?

A That's correct.

Q But would be allowed through?

A Yes.

Q Now, about the parking. Suppose, let's say, this was not an adult potential use and there were just two regular 35 millimeter theaters that held approximately 6 to 800 people total. Would the same problems with parking that you've identified today be in existence, sir?

A Yes, they would.

Q So that doesn't change anything, does it?

A No.

Q Were you asked to appear before the city council and tell them about the parking problems in connection with the Renton and Roxy Theaters in connection with the adoption of this order and the ordinances involved herein?

A (Pause)

[51] MR. WARREN: Your Honor, to cut this short, it appears on the exhibit that counsel has admitted previously as Exhibit 1, which is a tape of the minutes of the council hearing, he did. If it doesn't appear, he didn't.

THE COURT: Do we have all the hearings that there were on that tape?

MR. SMITH: I have what was given us, Your Honor.

MR. WARREN: Your Honor, he's asking about appearing before the council. Appearing before the full city council there are—

THE COURT: I think in connection with the adult ordinances.

MR. SMITH: Any of the ordinances herein.

THE COURT: I'll let him answer it, if he can.

THE WITNESS: Your Honor, there were a number of study sessions held by committees of the council which there was extensive discussion on a number of issues. At this point I can't recollect specifically whether that issue was discussed about those theaters. We did talk about parking problems for adult theaters.

Q (By Mr. Smith) You did talk about parking problems for [52] adult theaters?

A Yes.

Q In what context, sir?

A That adult theaters would draw traffic—or draw patrons from large areas and would need available parking.

Q Now, what studies did you undertake to do that made you qualified or give you the expertise to make that kind of statement to any of the committees?

A We reviewed the case of the *City of Seattle vs. North End Theater*, and the background that was contained in that case was primarily the basis.

Q You read the case, is that correct?

A Yes.

Q And you read a letter or sort of an opinion letter by one of the city attorneys, is that correct?

A Yes.

Q And nothing else, isn't that true?

MR. WARREN: Your Honor, I'm going to object. This is not a member of the city council and there were other people who testified that this is the sole basis of what he said or what he thought. I don't see that it's relevant.

THE COURT: Well, if we're clear we're only talking about Mr. Clemens.

[53] MR. SMITH: That's correct.

THE COURT: He can testify what he read and what he based his recommendations on. He can't, certainly, testify for everybody on the city council.

Q (By Mr. Smith) You can answer, Mr. Clemens.

A If you'd repeat the question, please?

Q Yes. Other than the *North End Cinema* case itself, published decision, and the letter from one of the city attorneys sort of summarizing the decision, did you read any other documents in connection with that case?

MR. WARREN: With respect to parking, Your Honor, or what?

MR. SMITH: Parking was the issue that I was addressing because that's the issue I think he said he had some conversation before one of the commissions.

THE COURT: You are talking about in connection with parking?

MR. SMITH: Yes, sir.

THE WITNESS: That was the material that we reviewed, yes.

Q (By Mr. Smith) And no other?

A That's all that I can recall at this time.

MR. SMITH: Excuse me, Your Honor.

[54] (Pause in proceeding.)

Q (By Mr. Smith) Sir, would you tell us by any of the exhibits that are up here which zone as a matter of

right an adult theater is permitted to locate in; as a matter of right?

A The city of Renton allows theaters to be located within the B-1 zoning classification as a matter of right.

Q As a matter of right?

A As a matter of right.

Q Now, is that a policy or is that by zoning ordinance, sir?

MR. WARREN: I object, Your Honor. The zoning ordinance is a continuing document that has—its interpretation was made by administrative determination. And, "As a matter of right," it is now a legal term that they're asking this witness to testify to and I don't think he can do that. That's up to the Court eventually.

THE COURT: I'm not going to allow him—I don't think he can testify as to whether it's a matter of right. I'll sustain the objection.

Q (By Mr. Smith) Well, sir, if somebody wanted to put a service station in the city of Renton, there are areas which you set aside by zoning for service stations?

A Yes.

Q Does it say a service station may located in this area?

[55] A I haven't looked at the B-1 district in the last couple of days, but I would guess that it does.

Q Now, is there a comparable zoning ordinance which says adult theaters can locate in this area?

A No, there is not.

Q Would you explain to the Court the difference between one that says a service station may locate in this area and the other one which does not say an adult theater can locate in this area?

A The distinction is that the ordinance says, "And other similar uses." The city of Renton hired professionals in planning and building to interpret whether "other similar uses" fall within the classifications that are prescribed.

In the case of the city of Renton's zoning ordinance, there is only one business district, the B-1 district. We have a variety of industrial districts. We have a variety of residential districts, but we have only one district prescribed for commercial uses. So as a result of that, significant weight is given to commercial uses that propose to locate within that district.

Q Would you tell me on this exhibit that you've previously identified that shows a list of the retail service or business uses allowed within the city of Renton under the provision of the B-1 zoning district, which one parallels [56] an adult theater, which of the uses that are listed here?

MR. WARREN: I'm going to object to the question, Your Honor. I don't think this witness can answer that and—

THE COURT: He prepared the exhibit. Which exhibit is that?

MR. WARREN: Exhibit A-6, I believe, Your Honor.

THE COURT: Would you hand him the exhibit?

THE WITNESS: Your Honor, the listing in this exhibit is a list of uses which are not listed in the zoning ordinance of the city of Renton, but which have been allowed by administrative doctrine both by the planning department and building department over a number of years that have located in the B-1 district.

Q (By Mr. Smith) Would you tell us which of these uses would be comparable to an adult theater?

A States as the second item from the bottom, "Theaters."

Q Do you distinguish between theaters and adult theaters in any of your zoning ordinances, sir?

A No.

Q You do not?

A No.

Q The Renton and Roxy could open tomorrow without any concern [57] about being 1,000 feet from any church or residential location, sir?

A That's correct.

Q As an adult use?

A No, sir.

Q But then there is a difference between a regular theater and an adult theater in your perception, is that not correct?

A Yes.

Q So, then, which of the uses that you detail in this exhibit would parallel an adult theater?

MR. WARREN: Your Honor, I'm objecting because he's trying to argue with the witness about the exhibit and mischaracterizes it.

THE COURT: He's already answered the question. The one that he feels is most similar is that for theaters.

Q (By Mr. Smith) Now, sir, you told us about the short plat technique of being able to get zoning approved, is that correct?

A Short platting to subdivide property into smaller parcels.

Q Would you tell us briefly in your perception how the short plat technique is going to work?

A Short platting is allowed for properties to be divided into—up to four different lots and the procedures [58] are prescribed in our subdivision ordinance requiring a public hearing before the hearing examiner, and subject to the conditions which may be established either by the subdivision ordinance or by the examiner as special conditions, the plat would be recorded and the lot would be divided.

Q What standard does the hearing examiner apply in determining whether an adult theater could do a short plat?

A We're not talking about an adult theater. We're speaking about a subdivision of land. There is never a discussion of the use of that land in a subdivision process.

Q So that whoever came and wanted to subdivide into four separate segments,—is that what it is?

A Four separate lots.

Q And there would be no requirement or no necessity of identifying one of the uses as being an adult theater use, is that correct?

A No, sir.

Q Is there anything which would stop the city council from the following week passing an ordinance making it impossible for an adult theater to locate in that area?

MR. WARREN: I'm going to object to the question because it's a legal question, Your Honor.

THE COURT: Sustained.

Q (By Mr. Smith) How many different ordinances has the city [59] council purported to pass relating to adult entertainment uses since the first of January, 1982?

MR. WARREN: If he knows, Your Honor.

THE COURT: If you know.

A I believe there have been two. I'm not positive.

Q (By Mr. Smith) And you have delineated, depending on how closely you review your maps, differing time and differing areas where you felt adult theater uses could be located, is that not correct?

A Yes. The maps that have been presented by the plaintiff are maps that were prepared as a result of the first ordinance. The maps which I have brought for today's hearing are in relationship to the most recent ordinance adopted by the city.

Q And the mistakes that appear on the ones originally, were those of your making? Is that correct?

A Yes.

Q Sir, on the areas that you've indicated—

MR. SMITH: If I may approach the board, please?

Q (By Mr. Smith) Now, is any of the area that is indicated in the green now zoned for residential use?

THE COURT: Which color green?

MR. SMITH: I'm saying of the areas [60] zoned, any green.

A The dark green color covers two areas that you'll note are slightly less green. Those are areas that are

presently zoned a G-1 classification, which is a holding residential classification.

Q (By Mr. Smith) Just residential?

A Yes.

Q So if these areas which are residential are hold, then one would have to mark or delineate a 1,000 feet from any area zoned as residential for locating an adult theater, isn't that correct?

A No.

Q Why not?

A Because the ordinance does not specify it.

Q The ordinance does not specify it?

A That's correct.

Q Who would have to take the responsibility of seeking a rezoning of the areas which are in the lighter green?

A The person proposing to use the property for other than residential purposes.

Q Now, could you tell the Court what the situation is with regard to street lighting in the area that is green at the bottom?

A To the best of my knowledge, the city's subdivision requirements require street lighting on all public streets. [61] I have not independently investigated whether the street lights in that area are up and working.

Q In connection with the area that's marked in a dark green here, are there any public streets that run through there?

A Yes.

Q At the present time?

A That's correct.

Q And you have no idea whether there's any lighting there?

A That's correct.

Q The area that you designated up here, you say is part of the Pacific Car Foundry location?

A Yes.

Q When did you first discover that that was available for adult use?

A It was after the preparation of my affidavit.

Q And how did you discover that?

A I simply misread one of my earlier working maps.

Q Did you do an eyeball inspection of that area, sir?

A Yes, I have.

Q And what is that location presently used for?

A It's a part of the truck testing facility that's a part of the PACCAR facility.

Q It is currently used as a truck testing facility?

A Yes, it is.

Q At the present time?

A Yes.

[62] Q All right. Now, what about the area that's marked down here off of—

A I believe that's Hardy and Southwest 7th.

Q Yes. In the corner there. Have you done an eyeball inspection of that piece, sir?

A As Mr. Johnson testified earlier, there's a Shakey's Pizza Parlor and a Burger King Restaurant.

Q Is there any other property available in that area that you know of?

A No. Only the parcels that those are currently on.

Q And they're brand new, are they not? Aren't they brand new within the past four or five years?

A Yes.

Q So that the area over here that—it looks like a river channel is flowing through that. What does that mean, sir?

A That's an abandoned channel. The channel is no longer in that location.

Q It's not part of the flood plain?

A No.

Q And that's on Thomas Avenue?

A That's correct.

Q Did you do an eyeball inspection of that area?

A Yes, I have.

Q Is that part of the industrial park?

[63] A There is an industrial building on the property.

Q Is there a plan that's been filed to designate that as an industrial park?

A It already is.

Q It is an industrial park. Light manufacturing, sir?

A I believe it's a warehouse.

Q Have you noticed whether there are any street lights in that particular area?

A No, I have not reviewed that.

Q Now, down here at the bottom there are a series of comments about, "It's a Burlington Northern Industrial Park" that encompasses most of the green area here, is that correct?

A A substantial portion of it, yes.

Q Do you have any idea what limitations the Burlington Northern places on prospective tenants in this location?

MR. WARREN: I'm going to object to the line of questioning, Your Honor. We're well outside the scope of the direct. He's going parcel by parcel, apparently.

THE COURT: Well, I'd allow him to re-open, anyway, and call him. Did he list this gentleman as a witness?

MR. WARREN: Mr. Clemens, no.

THE COURT: I'll have to cut you [64] off then. Sustained.

MR. SMITH: This is in response to the examination where they put the areas up. We have had a series of changes in the location which then we're confronted with another change, as I said in part, which is here, new evidence which is introduced. It relates to orange areas which we can now do platting. So this is all part of the—

THE COURT: I would let you inquire on cross with respect to his knowledge of the current uses of property where the maps they've now prepared are different and show different parcels than have been shown on the earlier maps. I'd allow you to cross-examine on those.

Q (By Mr. Smith)—Now, sir, this is again the Exhibit No. 8 and the area you've marked in green is the

area that you feel from your examination under the original ordinance an adult theater use could be located, is that correct?

A That is correct.

Q Now, is there any different areas on the exhibit that you've now brought in here, which is designated as A-1, and the overlays, any different uses that are currently being put to the land in this area for the green than was used in the area designated again on this map?

[65] A I'm afraid your question got lost.

Q Okay. I'll withdraw it.

If someone would come into your office as of the first of January of 1982 and inquire concerning the areas available in which to put an adult motion picture theater, which areas could he have found by inspection of the zoning ordinance were available, if you know?

A By inspection of the zoning ordinance?

Q Correct.

A The two classifications of the ordinance which you would look to would be the business district to determine whether a theater is allowed, secondly, the section on adult entertainment land uses, which speaks to adult theaters.

Q And the only area that one on June 1, 1982, could have determined was available is the area now marked in green on Exhibit 8, is that correct?

A On that date, yes.

Q On that date.

MR. SMITH: Thank you. No further questions.

MR. WARREN: Just one or two questions.

[66] REDIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Clemens, with respect to the first map, and that was the exhibit from the temporary restraining order hearing, how long did you have to prepare that map?

A A matter of hours.

THE COURT: Which exhibit are we talking about, 8?

MR. WARREN: I don't know the designation, but it was the exhibit from the temporary restraining order hearing.

THE COURT: Oh, yes. All right.

Q (By Mr. Warren) And, Mr. Clemens, you subsequently obviously found an error on that first map. Can you tell me the source of the error?

A Yes. The source of the error is that the concluding section of the adult entertainment land use district states that where a portion of a piece of property is within the prescribed distances, the entire parcel is eliminated. As a result the number of parcels were eliminated because of that section.

Q Now, with respect to the light green parcels on Exhibit 1-A with the white dashed line around it, which you explained G-1 zone and as a holding zone, do you know the comprehensive plan designation for those parcels?

[67] A Yes. They are industrial park, with the exception of the city's parcel which is currently a green belt—wet land area.

Q Mr. Clemens, outside of environmental reasons that might be put forward for the larger of those parcels, do you know of any reason why that property could not be rezoned—

MR. SMITH: Objection, Your Honor. Counsel has argued he's not a lawyer, he's not qualified.

THE COURT: Well, he's a planning and zoning expert, isn't he?

MR. SMITH: Your Honor, I'm just saying that the objection they made to the questions I asked him calling for expertise he didn't have.

THE COURT: I'll overrule the objection.

THE WITNESS: Subject to environmental considerations, I believe that the property could be zoned industrial park as shown in the comprehensive plan.

MR. WARREN: No further questions.

RECROSS-EXAMINATION

BY MR. SMITH:

Q Environmental considerations means what, sir?

[68] A Would include both the natural and human environments.

Q And human environment would include parking and traffic patterns, would it not?

A Yes.

Q Is there any way that someone would know in advance what the rules and regulations were that were going to be applied in terms of the natural environment?

A Yes. Both the State and National Environmental Policy Acts spell out the provisions quite clearly.

Q And what about with regard to the parking aspect and the traffic pattern? Would someone know in advance how you all were going to apply those environmental concerns?

A Yes. The city has a parking-loading ordinance which prescribes certain amounts of parking, number of driveways, and those kinds of things.

Q Is the Renton and Roxy Theaters in violation of that policy?

A No, sir.

Q Pardon?

A No, sir.

Q They are not?

A No, sir.

Q When did you learn that you had left out a piece on one of the exhibits where the Pacific Car Foundry was located?

MR. WARREN: Objection. Asked and [69] answered.

THE COURT: Well, maybe it has been. I'll let him answer it.

A It was after the preparation of the affidavit.

Q (By Mr. Smith) Which was some time in May? May 26, 1982. Does that sound correct?

A If that's the date on it. I don't have it before me.

Q Did you or, if you know, the attorney for the city tell counsel for the plaintiffs about that omission on your part prior to coming to court today?

A I'm not even sure that I brought it up with counsel because I realized that the parcel was already developed.

Q You had lots of time—when you say, "The parcel was already developed," what does that mean?

A There's an existing use on the property.

Q Which means it can't really be used, practically speaking, for an adult theater, is that correct?

A Correct.

Q Now, you had plenty of time to assert that the error was made and to advise counsel for the city, did you not, sir?

A Yes.

Q You didn't. You just chose not to let them know, is that correct?

A Yes.

[70] Q All right. Now, how long after you did the initial exhibit, we're talking about the map you testified in connection with the hearing on the temporary restraining order, how long after you did that map was it before you learned that you had made a significant error?

MR. WARREN: Object to the characterization.

THE COURT: Overruled.

A It was after the hearing.

Q (By Mr. Smith) The same day?

A No. It would have been within a period of—could have been several weeks after the hearing.

Q And did you then call that to the attention of your attorneys?

A Yes, we did.

Q And did you call that to the attention of the Court to tell them that you had made an error in your testimony?

A No, sir. I made the information available to counsel.

Q And you did not yourself communicate it to counsel for the plaintiff?

A No, sir.

Q Do you know whether or not your counsel communicated it to counsel for the plaintiff or to the Court?

A I have no independent knowledge of that.

Q Did you write a letter to them telling your counsel that [71] you had discovered this significant error?

A No, sir.

Q Did you discover the error prior to your deposition taken in early March?

A Yes.

Q And this map that you prepared is the one that you did not—you refused to give counsel at the time of your deposition, isn't that true?

A That's correct.

MR. SMITH: Thank you. No further questions.

MR. WARREN: I have no further questions, Your Honor.

THE COURT: You may step down, Mr. Clemens.

* * * *

EXHIBIT 3

4-711: B-1 BUSINESS DISTRICT:

A. In the B-1 Business District, no building, structure or premises shall be used or hereafter erected or structurally altered unless otherwise provided for in this Chapter, except for one or more of the following or similar uses:

(1) Any use permitted in Residence District R-2, Residence District R-3 and Apartment Houses and Multiple Dwellings District R-4 (but excluding any residential family dwelling uses specified in Residence District R-1) but any such use herein permitted in a R-2, R-3 and R-4 District shall be subject to all limitations and restrictions, including height and setback requirements as are applicable in the R-4 District.

(2) Banks.

(3) Barber shops, beauty parlors, personal service shops.

(4) Furniture stores, drug stores.

(5) Laundries, clothiers, cleaning and pressing establishments.

(6) Locksmiths, shoe and other repair shops.
(Ord. 2023, 4-15-63)

(7) Lumber yards and fuel yards, allowed by special permit following approval by the Hearing Examiner after public hearing thereon and acceptance of the design and an examination of the location with a finding that such proposed use is in compliance with all provisions, regulations and standards and will not be unduly detrimental to adjacent surrounding properties and enjoyment thereof; provided that when unhoused they shall be

surrounded by an eight foot (8') solid wall or sight-obscuring fence herein known as a structure, and the yard regulations of this district shall be observed and, provided further that

- A,7) no such lumber yard or fuel yards shall be maintained closer than one hundred feet (100') to the side lines of residential districts. (Ord. 3101, 1-17-77, eff. 1-1-77)

(8) Police and fire stations.

(9) Parking lots.

(10) Printing establishments.

(11) Public garages, repair shops and battery service stations and tire repair shops.

(12) Restaurants, cafeterias and caterers.

(13) Retail trade shops, arts and crafts shops or stores or combinations thereof.

(14) Sales room or store rooms for motor vehicles and other articles of merchandise.

(15) Service stations.

(16) Stores, shops, retail and wholesale markets, of all types or any combination thereof.

- A) 17. Studios, offices, business or professional.

18. Telephone exchanges, telegraph offices and employment agencies.

19. Undertaking establishments. (Ord. 2023, 4-15-63)

20. as amended: Mobile home parks as provided in the Mobile Home Park Ordinance, known as Chapter 20, Title IV, may be allowed by special permit if approved by the Hearing Examiner after public hearing thereon, the acceptance of the design, and

an examination of the location with a finding by the Hearing Examiner that such proposed use will not be unduly detrimental to adjacent and surrounding properties and the enjoyment thereof. (Ord. 3101, 1-17-77, eff. 1-1-77)

21. Self service storage facilities contained entirely within one building may be allowed by special permit, upon recommendation by the Hearing Examiner and approval by the City Council, after public hearing thereon and acceptance of the design and approval of the site plan, including but not limited to the landscaping and screening from adjacent properties, with a finding that such proposed use is in compliance with all provisions, regulations and standards and is compatible with the uses in the general area, and will not be unduly detrimental to adjacent surrounding properties and the enjoyment thereof. (Ord. 3333, 7-9-19)

- B. Signs are permitted only as specifically provided in the "Renton Sign Code" also known as Chapter 19 of Title IV (Building Regulations) of Ordinance No. 1628. (Ord. 2023, 4-15-63)

- C. Height Limit: Whenever any B-1 District is contiguous to any single family residence or suburban residence district, the buildings in such B-1 District shall be limited to the height of thirty five feet (35'), plus additional twenty five feet (25') by special permit after public hearing and examination of the location, upon due proof to the satisfaction of the City Hearing Examiner that such additional height will not be unduly detrimental to the adjacent and surrounding property. No building shall exceed a height of ninety five feet (95'). (Ord. 2023, 4-15-63; amd. Ord. 3101, 1-17-77, eff. 1-1-77)

- D. Front Yard and Side Yards: No yards are required except for lots whose side line is adjacent to a resi-

dential district where said yard regulations shall then be the same as in the residential district; front yard shall conform to adjacent residences, side yard to be not less than five feet (5'), side yards on adjacent streets to conform to front yards of residences to the rear but to be not less than ten feet (10') and rear yard shall not be less than ten feet (10').

* * * *

- (F) Conditional Use Permits. Upon proper application, the Hearing Examiner may grant conditional permits for such uses as require them under this Title.

1. Purpose of a Conditional Use Permit: The purpose of a conditional use permit shall be to assure, by means of imposing special conditions and requirements on development, that the compatibility of uses, a purpose of this Title, shall be maintained, considering other existing and potential uses within the general area of the proposed use. The Examiner may deny any application if the characteristics of the intended use would create an incompatible or hazardous condition. Except as provided in Section 4-722(F) (3) (m), the Hearing Examiner shall not use a conditional use permit to reduce the zoning requirements of the zone in which the use is to locate. Such reduction of requirements shall be accomplished only through the medium of a variance. The Examiner shall have the right to limit the term and duration of any such conditional use permit and may impose such conditions as are reasonably necessary and required. The conditions imposed shall be those which will reasonably assure that nuisance or hazard to life or property will not develop.

2. Additional Uses Permitted: The Examiner may, after a public hearing, permit the following

uses in districts from which they are prohibited by this Chapter where such uses are deemed essential or desirable to the public convenience or welfare and are in harmony with the various elements or objectives of the comprehensive plan:

(a) Cemetery, columbarium, crematory or mausoleum

(b) Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus, or appurtenances incident thereto.

(c) Educational institution, public or private

(d) Government offices and facilities (Federal, State and local)

F,2) (e) Hospital, sanitarium or similar uses

(f) Public or nonprofit library or museum

(g) Nursery or greenhouse

(h) Park, playground, or recreational or community center

(i) Philanthropic institution

(j) Private club, fraternal or nonprofit organization

(k) Public utility use or structure

(l) Radio or television transmitter

(m) Permit a less restricted use in a more restricted district as follows, provided such use, due to its limited nature, modern devices, or building design will be no less objectionable than the uses permitted in such district:

(1) Any B-District use in the P-1 District

(2) Any L-1 District use in the B-1 District

(3) Any H-1 District use in the L-1 District

3. Considerations, Finding and Determination: In reviewing conditional use permit applications, the Hearing Examiner shall be empowered to approve, conditionally approve or disapprove said conditional use permit applications based on normal planning considerations, including but not limited to the following factors:

- (a) Suitability of site;
- (b) Conformance of the comprehensive plan;
- (c) Harmony with the various elements or objectives of the comprehensive plan;
- (d) The most appropriate use of the land through the City;
- (e) Stabilization and conservation of the value of property;
- F,3) (f) Traffic flow;
- (g) Circulation;
- (h) Safety for vehicular and pedestrian traffic;
- (i) Imposition of noises, odors and health and safety hazards upon nearby residential area;
- (j) Provision of adequate light, air and reasonable access;
- (k) Securing safety from fire and other dangers;
- (l) Prevent overcrowding of land;
- (m) Facilitating adequate provision for transportation and in general, to promote the public health, safety, and welfare;

(n) Prevention of neighborhood deterioration and blight;

(o) The objectives of zoning and planning in the community;

(p) The effect upon the City's general welfare of this proposed use in relation to surrounding uses and the community.

* * * *

4—725: AMENDMENTS:

- (A) The Council may upon proper petition or upon its own motion, after a public hearing thereon and referral to and report from the City Hearing Examiner, change by ordinance the zoning classifications as shown on the district maps.
- (B) The Council may upon its own motion after public hearing and referral to and report from the City Planning Commission, amend, supplement or change by ordinance the regulations herein established.
- (C) An application for a rezone of property may be made by the property owner, or somebody authorized on his behalf on forms provided by and filed with the Planning Department. Such application shall be referred to the Hearing Examiner for hearing as required by Chapter 30, Title IV. All petitions for a rezone shall be accompanied by a plat in duplicate, drawn to scale, showing the actual dimensions of the tract to be changed, the size, the use and location of existing buildings and buildings to be erected and such other pertinent information as may be required by the Planning Department.
- (D) A petition for a change of zoning classification, seeking the same or substantially same relief as a prior petition, cannot be re-filed or re-submitted

with the Hearing Examiner or the City Council, for a period of twelve (12) months from the date of final disapproval or rejection of such prior petition. (Ord. 3463, 8-11-80)

* * * *

EXHIBIT 4

PLANNING AND DEVELOPMENT COMMITTEE COMMITTEE REPORT SEPTEMBER 8, 1980

REGULATION OF ADULT ENTERTAINMENT LAND USES (referred 6/23/80)

The Planning and Development Committee has considered the question of regulation of adult entertainment land uses and recommends that the City Council refer the matter to the Planning Commission for consideration at the earliest possible date. The Committee recommends that the Planning Commission be directed to hold public hearings at the earliest possible date on the subject of possible amendments to the Comprehensive Plan and amendments to the Zoning Code as may be desirable to regulate adult entertainment land uses within the City of Renton.

/s/ Randy Rockhill
RANDY ROCKHILL
Chairman

EARL CLYMER

JOHN REED

[EXHIBIT 5]

PLANNING COMMISSION
RENTON, WASHINGTON
[Address Illegible]

November 24, 1980

Renton City Council
Municipal Building
Renton, Washington 98055

RE: *ADULT ENTERTAINMENT LAND USES*

Dear Council Members:

The Planning Commission received and first considered your referral on adult entertainment "land uses" at its regular meeting on September 10. At that meeting, the Commission referred the matter to its Special Studies Committee for investigation and report back.

The Special Studies Committee initially met with Dan Kellogg, Assistant City Attorney, who explained the Council's referred item. The Committee members considered various options open to the committee and to the Commission. After looking at said options, it was unanimously decided by the Committee to refer the matter back to the full Commission with the recommendation that the Commission, in turn send the question of adult entertainment back to the Council for further action as it deems necessary. The Commission met at its regular meeting of November 12, and concurred in the Committee's recommendation.

The Commission, at this time, has before it many matters which it feels are of great importance and urgency. The Commission, therefore, respectfully suggests that the referred subject matter could best be handled by a Council

committee and a citizen's committee appointed by the Council and reporting directly to the Council for the specific purpose at hand.

The Commission also feels that most of the facets involving adult entertainment are not within the purview of the Commission, except perhaps in some later review of the zoning ordinance. The overriding consensus is that the Commission is overburdened with priorities which the Commission feels are in need of immediate action.

The Commission notes that the following pressing physical land use issues must be studied with the most expeditious speed possible (some of which obviously require lengthy time and study):

1. The Northeast Quadrant review of the comprehensive plan now under way and which will continue for eight or more months.
2. The Central Area study encompassing the downtown business district, South Renton, North Renton, Earlington, West Hill and Skyway, which likewise is under way and will continue for eight to ten months.
3. The Shoreline Master Plan which, by law, requires periodic review and update.
4. Review of the Green River Valley comprehensive plan.
5. Review of the comprehensive plan relating to mobile home parks.
6. Review of the parking and loading ordinance.
7. Review of the PUD ordinance.

As you can see, the Planning Commission schedule is very full. The Commission regrets its inability to handle the

Council referral at this time based on the above urgent priorities.

Respectfully,

/s/ Michael G. Porter
MICHAEL G. PORTER
Chairman,
Renton Planning Commission

MGP:ms

cc: Mayor Shinpoch
City Attorney

[Exhibit 6 to this hearing was inadvertently omitted from the initial printing of the Joint Appendix. It appears at JA 411.]

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[EXHIBIT 7]

PLANNING AND DEVELOPMENT COMMITTEE
COMMITTEE REPORT
APRIL 6, 1981

ADULT ENTERTAINMENT LAND USE—(Referred 12/1/80)

The Planning and Development Committee, after considerable review of this subject, including two meetings where public input was received, feel that it is in the best interest of the City of Renton and the desire of its citizens to provide regulation for the so-called adult motion picture theater location.

Therefore the Committee recommends:

1. That the Council concur and refer the subject to the Ways and Means Committee for the appropriate ordinance.
2. That the ordinance be written to reflect the following desired conditions:
 - a. No adult motion picture theater will be allowed in any area used or zoned residential or in any P-1 public use area.
 - b. A suitable buffer strip of 1000 feet from any residential or P-1 area also be a banned area.
 - c. The area enclosed in a one mile radius of any school (this is the minimum student walking distance) would also be a banned area.

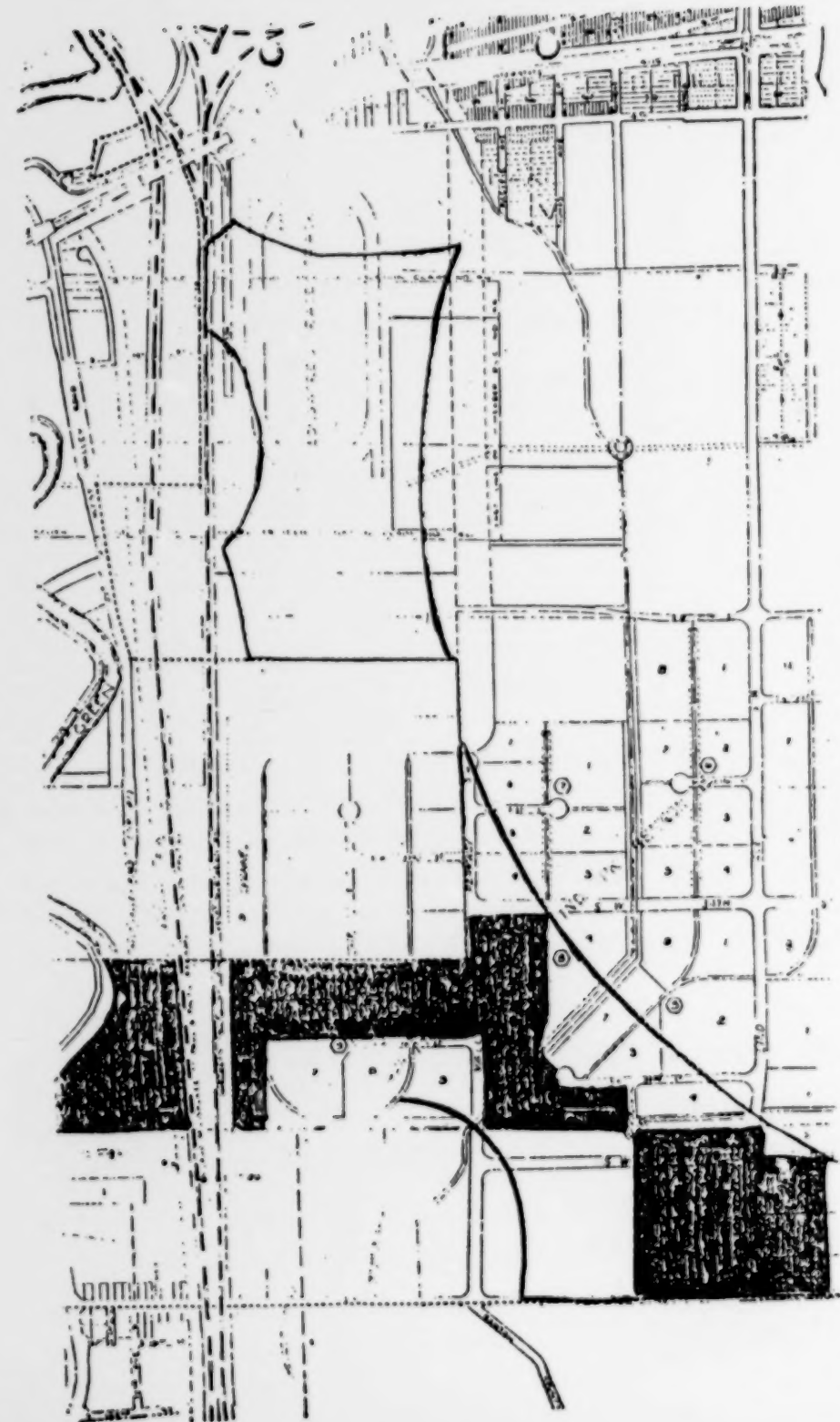
/s/ Randy Rockhill
RANDY ROCKHILL
Chairman

/s/ Earl Clymer
EARL CLYMER

/s/ John W. Reed
JOHN REED

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[EXHIBIT 8]



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiffs.

vs.

CITY OF RENTON, *et al.*,
Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF ROGER H. FORBES

BE IT REMEMBERED that the Deposition Upon Oral Examination of ROGER H. FORBES, appearing as a witness at the instance of the defendants, was taken at 100 South Second Street, Renton, Washington, beginning at the hour of 1:30 o'clock p.m., on April 9, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

ROBERT E. SMITH and JACK R. BURNS, Attorneys at Law, appearing for and on behalf of the plaintiffs;

JAMES CLANCY and MARK BARBER, Attorneys at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and [2] testimony taken, to wit?

EXAMINATION INDEX

Counsel	Page
Mr. Clancy	2-92

MR. CLANCY: This is the deposition of Roger H. Forbes as an individual person and as President of Playtime Theaters, Inc., and Kukio Bay Properties, Inc., in a Federal action known as Playtime Theaters, Inc., a Washington corporation, and Kukio Bay Properties, Inc., versus City of Renton and a number of other defendants. The deposition is on notice and there is a Subpoena Duces Tecum to produce a number of items at the deposition. The original service was on March 12th. The deposition was set for March the 19th and then pursuant to stipulation of counsel and convenience of counsel, it was continued to the present date which is April the 9th.

ROGER H. FORBES,

who having been first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLANCY:

Q Mr. Forbes, are you the Roger H. Forbes who is President of Playtime Theaters, Inc., and Kukio Bay Properties?

A I am.

Q Are you the person who verified the original Complaint which was filed in this action on January 20, 1982?

A Yes, sir.

[3] Q In that Complaint, you did verify the facts appearing therein as the President of both corporation, did you not?

A Yes.

Q With respect to the original Complaint, you stated that one of the parties is Playtime Theaters, Inc., a Washington corporation. Is Playtime Theaters, Inc., a corporation which was incorporated in the State of Washington?

A Yes.

Q When was it incorporated?

A I think 1976.

Q Do you remember what date?

A Probably around the end of February of that year.

Q What is the business of that corporation?

A The exhibition of motion pictures.

Q Is that the only business that it is authorized to do?

MR. SMITH: Objection; that's a legal question. What it is authorized to do and what it does are two different things. I will instruct him not to answer.

Q Do you have the Articles of Incorporation for Playtime Theaters, Inc.?

A Not in my possession.

Q Who are the officers of Playtime Theaters, Inc.?

A I am.

Q What office do you hold?

[4] A President.

Q Are there any other officers?

A No.

Q Who owns the stock in Playtime Theaters, Inc.?

A I do.

Q Are you the only stockholder in that company?

A Yes.

Q Where is the principal place of business for Playtime Theaters, Inc.?

A The main offices are located at 512 Second Avenue, Seattle, Washington.

Q Is that on any floor of that building?

A Second floor.

Q Any particular room?

A No, the entire second floor.

Q How many persons are employed in that office?

A Five or six.

Q Are they regular employees of Playtime Theaters, Inc.?

A Right.

Q What are the names of the employees?

A Mark Lowrie, Juanita Hamlin, Patty Jones, Lisa Puddy. I think that's about it.

Q You have given me four people.

A There are a couple of more, but I don't remember their names right offhand.

[5] Q What does Art Lowrie do?

A He's the Operations Supervisor.

Q Is that his official title?

A Yes.

Q What does Juanita do?

A She would be my Administrative Assistant.

Q What's her last name?

A Hamlin.

Q Is it Mr. Jones?

A No, Ms.

Q What does she do?

A Bookkeeper.

Q And Lisa?

A Advertising.

Q Did you say those individuals that you have just named, are department heads?

A Yes.

Q Does Lisa control the advertising that's done by Playtime Theaters?

A She makes up the advertising and places it.

Q Who is she responsible to?

A Me.

Q Is she authorized to do any advertising without your approval?

A She places the ads for the theaters on numerous occasions [6] without my approval and I don't see everything that's done.

Q Does she make up the ads without your approval?

A Sure.

Q What type of advertising does Playtime Theaters do?

A Advertises in the newspapers for the theaters that are operated by it.

Q How many theaters are there and how many places?

A Well, there is about a dozen theaters. There is advertising placed in the Vancouver newspaper, Vancouver,

British Columbia; Spokane, Tacoma, Bremerton, Seattle. I think that's about it.

Q How many cities is that a total of?

A Where the theaters are located?

Q Yes.

A Well, I would have to stop and figure it out. Seven, I think.

Q Have you named all of the cities?

A No. There are some cities that we don't advertise at all.

Q What would those cities be?

A Pasco.

Q Any others?

A Not that I can think of.

Q Is the same advertising done in each city or is there separate advertising done?

A A separate campaign is done for each city.

[7] Q Are they related in any way so that the ads for one city are run in a different city?

MR. SMITH: Object to the form of the question. If he shows one movie in Downtown Seattle, they obviously are not going to put the same ad for the same movie in Seattle that appears in Spokane. I think the form of your question is incorrect and I'll instruct him not to answer.

MR. CLANCY: Why is it so obvious that they are not going to use the same ad?

MR. SMITH: Why don't you ask if it is the same picture playing in every theater in the state at the same time? Obviously if they are, that's one thing. Your question doesn't frame that issue.

Q The ads that you place in one city for a given film, is that same ad used in other cities?

A Normally.

Q Does Lisa have the authority to make up the original ad which is run on a given film?

A Sure.

Q Does she submit it to you for your approval?

A Sometimes.

Q Let me ask you a general question then. Are the same films run in each of the twelve cities, in each of the twelve theaters that you have?

MR. SMITH: Object to the form of the question. [8] You mean at the same time or at different times or over a period of one year? That's too broad. I instruct him not to answer.

Q To be specific, what is the name of the theater in Seattle?

A There are two theaters in Seattle.

Q What are those?

A The Palace and the Embassy.

Q What's the name of the theater in Pasco?

A The Liberty.

Q What is the name of the theater in Spokane?

A The Dishman.

Q Bremerton?

A The Grand.

Q Tacoma?

A There are two theaters there, one is the Rex and the other is the Community.

Q What are the two cities that I haven't named as yet?

A Well, there is one in Portland called the Walnut Park and there is one in Point Roberts called Point Roberts, and there are two theaters in Renton that I probably forgot about, the Renton Theater and the Roxy. There is one in Redmond which is named the Cinemond.

Q Then as to Seattle, the Palace and the Embassy, does the Palace show the same film that the Embassy shows?

A No.

[9] Q In a given week, are the films that are shown at the Palace different than the films that are shown at the Embassy?

A Yes.

Q In a given week, do you ever show the same film at both theaters?

A No.

Q With respect to Tacoma, the Rex and the Community Theater, in a given week, is a given film shown at both theaters at the same time?

A No.

Q Do I understand you to say that the Rex and the Community Theaters always show a different film?

A Yes.

Q With reference to the ten theaters that you have named, excluding the two in Renton, in a given week, do any of those ten theaters show the same film?

A Possibly.

Q With respect to the ten theaters, are the films shown at random in each theater or is there a specific procedure that you use as to each film?

MR. SMITH: Do you understand the question?

THE WITNESS: I know what he's trying to say. There is not—if you are looking for a particular formula as to the way they play together or not play together, [10] there is not a set formula that is not in a state of change.

Q Let's go to specifics. Do you know what is now showing at the Palace in Seattle?

A No, I don't.

Q Do you know what is now showing at any of those ten theaters that you have just named?

A I really don't.

Q With respect to your administrative assistant, Mrs. Hamlin, what is the authority of Mrs. Hamlin as your administrative assistant?

A To supervise the operation of the business when I'm not in town.

Q When you are not in town, what does she do?

A Well, we are normally in communication by telephone, and she would alert me to whatever is transpiring in the day-to-day operation of the business, and I would instruct her how to handle the situations that arise.

Q What would be her duties in a given day when you were not in town?

A Well, I don't know exactly how to answer that because unfortunately the people that work for me don't have a specific job outline to work by so they do whatever becomes necessary at that time.

Q What are some of the things she would do normally?
[11] Well, if you could ask me whether she does or she doesn't do something in a certain area, I can tell you yes or no, but I can't really give you an outline of what she does.

Q Are there certain things that you expect her to do?

A Nothing more than to make sure that things run along properly.

Q Does she make up payroll?

A No.

Q Does she select what movies are to be played at the separate theaters?

A No.

Q Does she purchase equipment for the corporation?

A If you are talking about adding machine tape, yes. If you are talking about projection equipment, no.

Q Does she enter into negotiations for the leasing of films?

A No.

Q Does she make any decision on what films would be shown by the ten theaters?

A No.

Q Does she examine the films which are to be shown at the theaters?

A No.

Q Which of the four individuals that you have named would be the person who would examine any of the films that you show before they are shown?

[12] S None.

Q Who's the person who has the authority to examine the films before they are shown?

A Dick Witte.

MR. SMITH: As in Pussycat Theater Chain in Los Angeles.

Q Where is Mr. Witte?

A He's located in Los Angeles.

Q Where is he located in Los Angeles?

MR. SMITH: I told you, the Pussycat Theater, the main office in Santa Monica.

Q What is the relationship between the Pussycat Theater and Playtime Theaters, Inc.?

A They are retained as the film-buying service for Playtime Theaters, Inc.

Q Is that by written contract?

A Verbal.

Q Has it ever been in writing?

A No.

Q Inviting your attention to the year 1972 when Playtime Theaters, Inc., was incorporated, was that incorporated by you? I believe you said it was in February?

A Yes, it was incorporated by me.

MR. BURNS: The year wasn't correct.

Q What was the year?

[13] A '76.

Q At the time of the incorporation, what were the officers of the corporation?

MR. SMITH: Objection as to relevancy unless you can verbalize and demonstrate the relevancy to the lawsuit and reasonably leading and calculated to discovery evidence material to your counter-attack, then we will instruct our client not to answer.

Q You are now the President?

A Yes.

Q How long have you been President?

A Since the inception.

Q That was February, 1976?

A I think so.

Q How long have you been the sole stockholder in the corporation?

A Since its inception.

Q You say Mr. Witte has been retained as the film-buying service. How long has Mr. Witte been under contract to Playtime?

A Since January 1st of 1982.

Q Prior to January 1st of 1982, who was authorized to examine the films that are shown at Playtime Theaters?

A I was.

Q Were you the only person who was authorized?

[14] A Well, we had a number of people view the films, if that's what you are talking about.

Q Who else then was authorized to review the films besides you?

A Well, the individual theater managers and we have Art Lowrie.

Q Is Mr. Art Lowrie the Operating Supervisor?

A Yes.

Q How long has Mr. Lowrie been the Operations Supervisor.

A Four years maybe.

Q What are his duties as Operations Supervisor?

A What the title says, supervises the operation of the theaters, the hiring and firing of the managers, the way the theater is kept, the way they are equipped.

Q Does he select the films for those theaters?

A No.

Q Did he have any authority for selecting the films?

A At that time?

Q Yes.

A On occasion, yes.

Q On what occasions would he be given the authority to select the films?

A If I hadn't got around to booking them.

Q Were any other individuals authorized to select the films for the theaters?

[15] A Not to my knowledge.

Q Then my understanding of your testimony is that on January 1st of this year, you changed your procedure so that Dick Witte is the one who selects the films?

A That's true.

Q Prior to that time, you selected the films?

A Yes.

Q Except on occasion and then Art Lowrie did perform that function when you were not available?

A That's true.

Q When was the contract with Mr. Witte negotiated?

A In November of 1981.

Q Any particular reason why you changed your operating procedures?

A Yes.

Q What was the reason?

A Because I didn't look at all the films and seeing that they are the dominant theater circuit in California, that they look at all the films and would have a better feel for what is going on and could select better films for me to exhibit.

Q Are the films that you show, the same films that are shown at the Pussycat Theaters?

A Yes.

Q Do you show any additional films that they do not show?

[16] A Not to my knowledge.

Q Does he look at the print that is to be shown at your particular theater?

A I presume that all the prints are the same. He looks at one of them.

Q Are the prints that you receive at your theaters sent to you by Mr. Witte?

A No, they are shipped to us from the distributor.

Q Who is the distributor?

A There are numbers of different distributors.

Q What are the names of some of those?

MR. SMITH: Objection. There is no relevancy, we think, to the zoning ordinance challenge as being unconstitutional with regard to who the distributors of films are. I instruct him not to answer.

MR. CLANCY: Well, the basis for my inquiry is that would be in the defenses that the City intends to assert in the answer, one of which subject matter would be obscene and in violation; two, that the films are received from an agency which is not in the normal distribution of

traditional films; three, that the films which are shown by the distributor, handled by the distributors are that type of film which is of pandering type of film, and it would be a circumstance of the production, distribution and exhibition of such films which would be relevant, which [17] would be probative on showing the nature of the operations of the corporation, that is, the films which are shown are films which are pandered.

MR. SMITH: We would object and would continue our objection to Mr. Forbes being asked those questions. I don't think they are relevant. Number one, the Magistrate has already advised the parties that your pandering concept doesn't hold much water as far as he's concerned. I don't see where it's relevant to any possible defense. We have admitted that these are adult films which are going to be shown at the theater. You talk about other than the ordinary course of distribution for normal films, they are subjective terms which you are using by your standards, and I don't think that you have established any standard of what is normal and what is not normal distribution. If you ask Mr. Forbes what kind of films he shows at his theaters and has shown at his theaters in the past years, he will be happy to answer you, and in that way you will have what you need to know, in our opinion. Otherwise, I would instruct him not to answer.

Q Mr. Forbes, how long have you been a motion picture theater operator?

A Well, I have been in the exhibition of motion pictures since I was sixteen years of age.

[18] Q Going back to sixteen then, what were you doing at sixteen?

MR. SMITH: Objection. The time period is far beyond the scope of anything we have here. We presume that Mr. Forbes is thirty-nine years old. That's an awfully long time ago. If you want to go back the last five years, fine.

MR. CLANCY: He went back to sixteen.

MR. SMITH: You asked him when he was in the theatrical exhibition business. He might have done it in

a Boy Scout Troop when he was sixteen. What's the relevancy to this particular inquiry?

Q How long have you been the owner-operator of a motion picture theater?

A With this corporation, since 1976.

Q Then prior to 1976, were you a motion picture theater operator-owner?

A No.

Q When did you first become the owner-operator of an adult motion picture theater?

MR. SMITH: Objection, asked and answered. He told you 1976.

MR. CLANCY: Repeat the question, please.

(Last question read back.)

MR. SMITH: You can answer for the year.

[19] THE WITNESS: I don't remember exactly.

Q Was it prior to 1976?

MR. SMITH: Did the question say owner-operator?

MR. CLANCY: Yes.

A I would have to stay with 1976 really. I can't sort the rest of it out.

Q Then the answer is that you first became an owner-operator of an adult motion picture theater in 1976?

MR. SMITH: Objection. His answer is to the best of his recollection, he became an owner-operator in 1976. You have made a modification and drawn an improper conclusion from what he said. He said he couldn't sort it all out.

Q In the period between 1976 and 1982, has the Playtime Theaters, Inc., always been an operator of adult motion picture theaters?

A They have operated motion picture theaters.

Q Do the ten theaters that you have named show regular film fare other than adult motion pictures?

A They show motion pictures. Motion pictures are motion pictures to me.

Q Do you understand an adult motion picture to have any particular meaning?

A A motion picture made for adults.

Q Does Playtime Theaters show motion pictures that are meant [20] to be shown to adults?

A Yes.

Q Do they show other motion pictures that are to be shown to persons that are not adults?

A It has.

Q On how many occasions?

A Well, I can think of at least two theaters that we had that showed other than adult motion pictures.

Q What theaters are those?

A Well, both of which we no longer have. One is the North End Cinema, which is called the Greenwood Theater today. The other one was called the Rainier Cinema.

Q Is that in Rainier, Washington?

A No. It's in Rainier Valley in Seattle.

Q Do you own that now?

A No.

Q Did you at one time own it?

A I had a lease on the property.

Q How long was it operated by you?

A A year.

Q In the period of that year, did it show adult motion pictures?

A It did in the beginning.

Q For how long in the beginning?

A Two or three months.

[21] Q Did it cease showing adult motion pictures at that time?

A Yes.

Q It then went over to the showing of regular motion picture film?

A Yes.

Q Was there any event that brought this about?

A Just a change in my booking policy of the theater.

Q Was there any particular event that caused you to change your booking policy at that theater?

A I felt that it would be more viable as a—what some people would term a general release theater than it was as an adult theater.

Q Was there any objection by the City authorities to the nature of the film?

A No.

Q Was there any protest by the citizenry concerning the nature of the films which were being shown?

A Not to my recollection.

Q Did you ever appear at any meetings in which an objection was raised to the showing of adult films at that theater?

A No.

Q Is it your testimony that regular films were shown for the nine to ten months at that theater during the year's lease?

A Yes.

[22] Q At the end of the year's lease, did you cease operating the theater?

A I certainly did.

Q Was there a particular reason?

A Yes.

Q What was the reason?

A Because I was losing money hand over fist in that theater.

Q You say this was for a period of a year. What year was that?

A I don't remember, to tell you the truth.

Q Was it during the year 1981?

A No.

Q 1980?

A I don't know.

Q Was it closer to 1976 than 1982?

A I would think so.

Q Do you know the approximate year?

A No, I don't.

Q The North End Cinema, how long did that theater show film fare for persons other than adults?

A I would have guessed that during the last year that I operated the theater, it either operated with a split policy of general audience film, Sunday, Monday,

Tuesday and Wednesday, or Sunday, Monday, Tuesday, and adult films Wednesday-Saturday, or I operated with just general audience [23] films. But if it was originally strictly an adult policy, then it would have a split-week policy and then I had a general audience policy.

Q How many years were you the operator of the North End?

A A couple of years, I guess.

Q Was there a particular reason why you ceased operating the North End?

A There certainly was.

Q What was that reason?

A A problem with the landlord.

Q What kind of a problem was that?

A Well, there was a suit filed, and I can't tell you what the whole ramification of it was, but it was settled by relinquishing the theater.

Q Was there an unlawful detainer action?

A I don't think so.

Q What was the nature of it?

A I don't remember.

Q Was it in connection with the lease?

A It could have been.

Q What did they allege in the lawsuit that was a violation?

A I don't really remember.

Q Where was the lawsuit filed?

A Seattle.

Q Who was the landlord?

[24] A Theater Drapery Supply Company, I think.

Q How long was the lawsuit pending in the courts?

A I don't really remember.

Q Was there a compromise reached?

A Yes.

Q What was the tradeoff that you gave him in the compromise?

A The tradeoff was—there was actually a suit filed in regards to two theaters, one in Tacoma and one in

Seattle, and we maintained the one in Tacoma and relinquished the one in Seattle.

Q What kind of damages were they claiming?

MR. SMITH: Objection. I think this has gone too far. I don't think it's relevant to any discovery in connection with the zoning ordinance in Renton. I'll instruct him not to answer. The lawsuit itself can be obtained by you and you can review it to your heart's content.

Q Did any of your trouble with the landlord have to do with a zoning ordinance of the City of Seattle with relation to adult films?

A No.

Q Was the lawsuit a personal matter between you and the landlord and unrelated to governmental action?

MR. SMITH: Objection. I indicated the lawsuit is available to you if you want to pursue it. He doesn't [25] have these things and I don't think there is any relevance here to the present proceeding before the court, so I will instruct him not to answer.

MR. CLANCY: I'm searching his mind if he knows any information about these lawsuits. While it's true that I can probably get the papers and lawsuit by searching the record, it is also true that I can ask him questions concerning lawsuits in relation to adult motion picture theaters and determine whether or not those lawsuits are government-related.

MR. SMITH: I indicated to you that I don't think it is relevant in these proceedings. I don't think that your theory of saying you can ask him about any lawsuit involving any adult theater and whether or not they are government-related, carries water. So I will instruct him not to answer in view of the fact that that information is available to you as it is to anyone else. It is public record of King County.

Q What about the Greenwood Theater?

A Same one. The name has been changed. It was the North End Cinema Theater. The property was since sold and the name was changed to Greenwood.

Q Then my questions were to the North End?

A Which was named the Greenwood now.

Q So there are actually two theaters then that played films [26] which were not adult motion pictures?

A That's true.

Q What other theaters in your ten-theater chain show films which are not adult films?

A None.

Q Then these two theaters, the North End and the Rainier, are the only theaters which have been operated by you since 1976 which showed other than adult film; is that correct?

A There are two other theaters currently today that are not showing adult films.

Q Well, I was limiting the question to the ten.

A I would believe that that is true.

Q The two that you say are showing nonadult are the two here in Renton?

A Currently, yes.

Q So that during the period of 1976 to the present day, the only theaters which you have operated have all shown adult film fare except for those two?

A That's true.

Q Let's fix the time involved. Concerning the North End and the Greenwood Theater, do you recall approximately when you had the lease of that theater and when did you terminate the lease?

MR. SMITH: Objection. I'll instruct him not to [27] answer. There is no relevancy to the present lawsuit.

MR. CLANCY: The relevance has been established thus far that he operates ten theaters which show only adult motion picture films of the same type, and he's done that since 1976 except for those two theaters, the Greenwood and the Rainier. I am attempting to ascertain the approximate year in which it was terminated.

MR. SMITH: Object to the question. On page 4 Lines, 19, 20, 21 and 22 cover the Amendment and Supplemental Complaint where we indicate the lease agree-

ments to be entered into by the parties provide the premises to be used for the purpose of conducting adult motion picture theaters. We went on to the next paragraph which is beginning on Line 26 that from January 29, 1982, under the operation and management of Playtime Theaters, Inc., one of said theaters would continuously exhibit adult motion picture film to an adult public audience, but for the intents of your defendants, they would be doing so. I think we have clearly put our case in our pleadings that that is what he intends to do with this theater, one theater. I think that what he did in the past in the other two theaters, be it the Greenwood Theater formerly known as the North End Cinema, or the Rainier Theater, is wholly without the scope of this inquiry. I would object and instruct him not to answer.

[28] MR. CLANCY: Let me say this, Mr. Smith, that it may be that that is his present intention today by virtue of the fact that he's filed a lawsuit that is being resisted, but the City of Renton is not bound by his statement now that that's what he intends to do, particularly where the evidence shows that the only films that he has shown since 1976 have been adult motion picture films. Further, that when he showed nonadult motion picture films that were nonproductive, he then ceased operations or changed their fare. So I think it's entirely relevant and probative and a proper question.

MR. SMITH: We disagree. What he says now and the fact that he may have changed that, he can only change it to other than adult. The only factor that the ordinance addresses is adult theaters, so if he changes it to regular, how, then by your theory of rationale and reasoning, does that in any way affect the City of Renton because then he can operate. Secondly, you say he only has this experience with the other two theaters. He has obviously told you that he has the experience presently with two theaters in Renton. The fact that there is a lawsuit filed and what he changes or doesn't change, he has said that he is going to operate an adult theater. I think that's sufficient for the purposes of this lawsuit.

MR. CLANCY: Mr. Smith, I thought you were [29] directing my attention to the allegation that one of the said theaters would continuously operate on Page 4?

MR. SMITH: Correct.

MR. CLANCY: Now I'm making an inquiry as to whether or not it is reasonably probable that although he alleges that one of them will be, that more than likely he will not in the future.

MR. SMITH: Well, then, ask him that question, Mr. Clancy. Don't dance around the flagpole. Ask him a specific question. If you want to ask him if business circumstances are so bad that he is losing absolutely tons of money there as he indicated he was before, will he then change the film fare as projected now from regular film fare for a general audience to adult film fare. That's fine. He can say yes or no and the reasons why. That addresses the question. This business of what happened then, who, what year it was, really doesn't have any relevancy, and I would object.

MR. CLANCY: Let me just say this. The questions that are asked are framed by the person taking the deposition.

MR. SMITH: Correct.

MR. CLANCY: You can object on the grounds of relevancy. You objected that it wasn't a proper question and I'm saying that it is a proper question on this [30] discovery, and I was pointing to the allegation and why it was relevant.

MR. SMITH: I say that in the form it is asked, it is not relevant. My objection stands.

MR. CLANCY: Then you are instructing him not to answer?

MR. SMITH: I have instructed him not to answer in the form you asked, because it is not relevant.

MR. CLANCY: Well, it doesn't have to be relevant. It can lead to information in another regard.

MR. SMITH: Mr. Clancy, I have been practicing law almost as long as you have. I have been in Federal Court

almost as long as you have. I think I will practice law my way. You practice it your way. I stated my objection. If you don't like what I have done, you have your option to go to court and have this resolved. If the magistrate agrees with you, then fine. You will get your sanction at \$50 an hour.

MR. CLANCY: I didn't say sanction. I was just framing the rationale for my question.

Q In regard to the films that you select for your theaters, do you recall when it was that you changed your format from adult films to general run film at those two theaters?

MR. SMITH: Objection to any questions about [31] those two theaters beyond what has already been asked on the basis they are not relevant nor do they reasonably lead to the discovery of any evidence for the defense of this case.

Q When you were deciding on what films were to be shown at those two theaters when they were not showing adult motion picture films, did you approach the same distributors as for the nonadult motion picture film?

MR. SMITH: Same objection as before. I instruct him not to answer.

Q You say that you get your films from a number of distributors. Have you since 1976 gotten your distribution from those same distributors?

A You mean are they the same distributors today as they were in 1976?

Q Yes.

A I presume that some of them are, and some of them aren't.

Q Did you draw your films from the same sources in general?

MR. SMITH: Do you understand the question?

THE WITNESS: No. I don't understand that that is any different than the one I just answered.

Q Then what are the names of some of the distributors?

MR. SMITH: Objection. As previously stated, it is not relevant. It is not calculated to lead to information which is responsive to the issues framed by this lawsuit.

[32] MR. CLANCY: I take it from your objection that you object to giving the names of any of the distributors of his films?

MR. SMITH: That's correct. If you want to move to produce the documents that will list the names of the producers or distributors, we will object to that in the format of court.

Q With respect to Kukio Bay Properties, Inc., on Page 4, Line 7, of the original Complaint, you indicate that it is a Washington corporation. Is it a Washington State corporation?

A Yes.

Q When was it incorporated?

A I don't remember exactly.

Q Do you have the Articles of Incorporation for the Kukio Bay Properties, Inc., with you?

A Not in my possession.

Q Approximately how many years has it been operated as a corporation?

A About the same length as Playtime, I think.

Q Was it incorporated at or about the same time as Playtime Theaters, Inc.?

A I'm not positive. I don't think so.

Q Were you the incorporator?

A No.

[33] Q Who was the original incorporator?

A I don't remember the names right off now.

Q Who owns the stock in Kukio Bay Properties, Inc.?

A I do.

Q Do you own all of the stock?

A Yes.

Q When did you purchase the stock?

A Someplace in that period around '76, I think.

Q Who did you purchase the stock from?

A One of them, I think, was named Garnett Balsom and a fellow, I think, named Jack Sweeney.

Q What was the percentage of stock held by each of those individuals?

A I don't remember.

Q Did you purchase all of the stock at one time?

A No.

Q Which stock did you purchase first?

A I think Garnett Balsom's, but they were within a short period of time from one another or they may have been together. I don't really remember.

Q Do you remember which of those two had the greater amount of stock?

A No, I don't.

Q During the period 1976 to the present date, have you always been the sole stockholder of Kukio Bay Properties?

[34] Yes.

Q What type of business does Kukio Bay Properties do?

A Real Estate.

Q What is it authorized to do?

MR. SMITH: If you know.

A Purchase, hold and develop real estate.

Q What type of real estate does it purchase, hold and develop?

A No particular type, but the majority of it is motion picture theaters.

Q What are its holdings?

A Could you be more specific?

A You say the majority of its business is motion picture theater. What type of business does it do with motion picture theaters?

A Lease motion picture theaters.

Q Which motion picture theaters does it lease?

A Well, it leases the Renton Theater in Renton and the Roxy Theater in Renton, the Liberty Theater in Pasco, the Grand Theater in Bremerton, the Rex Theater

in Tacoma, the Community Theater in Tacoma. In fact, I think it leases—it either owns or leases all of the twelve theaters that were mentioned.

Q Which theaters does it own?

A Well, it owns the Point Roberts Theater in Point Roberts and [35] the Cinemond in Redmond and the Liberty Theater in Pasco, the Grand Theater in Bremerton, the Rex Theater in Tacoma, the two theaters in Renton, if I haven't mentioned those already. That's about it.

Q I thought originally what you said was that it leases the Renton and the Roxy?

A It owns them and leases them to Playtime. It either acquires leases and leases them back or purchases the property and is leasing them out.

Q So that all of those theaters it all owns, also leases them, too?

A Currently leases them to Playtime.

Q With respect to your allegation on Page 4 of the original Complaint, Line 11, on or about November 25, 1981, Kukio Bay Properties entered into a Purchase Agreement for \$800,000. What was the nature of that agreement?

MR. SMITH: If you remember.

A What do you mean?

Q On or about November the 25th of last year—

A I think it's November 25th of this year.

MR. SMITH: November 24 of 1982?

THE WITNESS: I'm sorry, November? I thought he was talking about January.

Q Concerning Kukio Bay Properties, you are the President of Kukio Bay Properties?

[36] Yes.

Q There are no other officers in the corporation?

A That's true.

Q Where is its principal place of doing business?

A 512 Second Avenue, Seattle, Washington.

Q How many persons does it employ?

A One.

Q Who is that person?

A Myself.

Q Are you a paid employee of the corporation?

A Yes, I am.

Q What is your title?

A President.

Q What payment do you receive as President?

A It varies from year to year.

Q How is your salary determined by the corporation?

A The stockholders and Directors have a meeting and determine what it is going to pay me that year.

Q Who are the stockholders and directors?

A I am.

Q When is the meeting held?

A I don't remember the exact date.

Q Has one been held this year?

A For this year?

Q Yes.

[37] A We operate on a fiscal year.

Q January to December?

A No.

Q July to July?

A No.

Q What is your fiscal year?

A March through the end of February.

Q Has that always been your fiscal year?

A I think so.

Q When was the determination made during the period March, 1981, through February 28, 1982, as to what your employment wages were?

A To tell you the truth, I don't remember because I haven't got the stuff here in front of me.

Q Was it made at the beginning of the year?

A Yes.

Q Are you the only person who is authorized to make decisions in Kukio Bay Properties, Inc.?

A Yes.

Q Getting back to Playtime Theaters, Inc., and the management and control of that corporation, of the four employees that you named, do any of those four employees have any degree of control over the corporation and business itself?

A No more than I delegate to them.

Q Have you delegated any authority to each of those four [38] employees?

MR. SMITH: Objection, asked and answered.

Q Have you then as to your answers, explained the limits of the authority of each of those four employees?

A I don't understand the question.

Q Concerning the bookkeeper Patty Jones, does she have any authority other than that other bookkeeper as an employee?

A That's her job.

Q Does Lisa have any authority in the advertising end of the business other than what you have related in your previous testimony?

A No.

Q Does Mr. Art Lowrie, the Business Operations Supervisor, does he have authority other than you have designated?

A No.

Q At the present time he doesn't do the films before they are shown?

A That's true.

Q Does he do any of the selection of the films that are to be shown at your theaters?

A No.

Q Are you the only person who makes that selection?

MR. SMITH: Objection; asked and answered. He told you he doesn't make the selection.

Q Then what is the contract that you have with Mr. Witte [39] concerning the films which are to be shown?

A What do you mean?

Q You say you did enter into a contract with him in March of this year?

A Right. Not March of this year. We entered into it. In November we discussed it and said that the beginning date would be January 1st.

Q January 1st of this year?

A That's right.

Q What was the agreement that was reached concerning that particular contract? What was he to do and what were you to do?

A He was to select the films to be exhibited in my theaters and make the deals with the distributors on what their share of the revenue would be.

Q Was there any restriction on his authority to select films?

A What do you mean?

Q Does he have a carte blanche to select any films?

A I don't understand what you are talking about. You are asking me whether he has the right to determine tomorrow I am going to play Walt Disney in the Palace Theater, he doesn't have that right.

Q Does he have the right to say he's going to supply you with Walt Disney?

A No, he doesn't.

[40] Q Who does select the nonadult films

A Sterling Recreation Organization, SRO.

Q Where are they located?

A In Bellevue.

Q Do you have a written contract with them?

A No, I don't think so.

Q When did you enter into the contract for those services?

A Sometime in January.

Q January of 1982?

A Yes.

Q Prior to that time, who selected your nonadult motion picture films?

A We hadn't been playing any nonadult motion picture films, but in the previous years when I had theaters

showing general release or nonadult films, Sterling has always done my film buying for me.

Q Where is Sterling located?

A In Bellevue.

Q Do you have the address?

A No, I don't. I used to work for them. I can tell you what the address was then. We used to have offices at 975 John Street.

Q Do they also supply adult motion picture film?

A They have exhibited adult motion picture film in their theaters from time to time.

[41] MR. SMITH: He asked you if they supply, meaning you.

THE WITNESS: No. They don't supply me with anything.

Q Then is the Sterling Recreation Organization, is that a theater?

A No, it's a chain of motion picture theaters.

Q Is it a chain which shows adult motion picture films at the present time?

A You mean once in a while or continuously?

MR. SMITH: Generally.

A I don't know that they have one on their screen today. They might have someplace.

Q Do you have a copy of the real estate Purchase Agreement that was entered into on or about the 25th of November 1981?

A Not in my possession.

Q Do you know where that agreement is located at the present time?

A No, I don't.

Q Are you one of the signers of the agreement?

A Yes, I am.

Q Would it be located at the principal place of business of the corporation?

A Possibly.

[42] Q You seem to indicate that there is a question in your mind as to where it is located?

A Where my office is located?

Q No, the real estate agreement.

A I don't know that it is in my office. It could be at my attorney's office.

Q Who is your attorney?

A Jack burns.

(Short recess.)

Q You have indicated that on Kukio Bay, you are the only officer and the only director; is that correct?

A Yes.

Q Does the same hold true for Playtime Theaters?

A Yes.

Q You are the sole officer and there are no directors?

A I'm the only director.

Q Let me ask you concerning your bank accounts for those corporations. Do you maintain separate bank accounts for the two corporations?

A Yes, I do.

Q Do you comingle the monies of one corporation with the other corporation?

MR. SMITH: Do you understand that term?

A Not to my knowledge.

Q All of the income of one corporation goes into its own [43] bank accounts?

A As far as I know.

Q All of the expenses of the individual corporations are paid out of the bank accounts of the corporations themselves?

A I would assume so.

Q Who are the persons who are authorized to write checks on the account of the Playtime Theaters Corporation?

A Are you asking me who can sign the checks or who can write the checks?

Q Who can sign the checks?

A Myself and Juanita Hamlin.

Q Juanita Hamlin is the—

MR. SMITH: Administrative assistant.

Q Do the checks require the signatures of both individuals?

A No.

Q Each have equal authority to sign?

A Each can be, yes.

Q Does that hold true for both of those corporations?

A Yes, it does.

Q The business of Kukio Bay Corporation, is that administered by these four individuals or any of those four?

A The bookkeeping aspects are taken care of by Patty Jones.

Q What other business of Kukio Bay is administered by any of those four individuals?

[44] A None.

Q What authority does Juanita Hamlin have in relation to the Kukio Bay Corporation?

A None except sign checks.

Q Who keeps the records for the Playtime Theaters, Inc. corporation?

A What kind of records?

Q Business records.

A Well, I don't understand what you mean.

Q What kind of records does Playtime Theaters, Inc. keep?

A I presume that it keeps the standard type of business records that any corporation would keep.

Q When you use the word "presume," do you mean you don't know?

A That means that that's my weak suit.

Q Would you explain what you mean by your weak suit?

A That I'm a person who in operating businesses, am not a bookkeeper, and I'm not real swift on how it is all done.

Q Are you saying you can't identify what any of the records of either of Playtime Theaters is?

A I don't know what you mean.

Q Who has charge of the correspondence?

A Well, I'm sure that it is taken care of, but exactly how, I don't know.

Q Do you originate correspondence yourself?

A Very little.

[45] Q Do you originate any correspondence?

A Very little.

Q What type of correspondence do you originate?

A It could be in thanking people who write letters who support my cause.

Q How do you transact your business, then?

A On the telephone mostly.

Q Well, concerning your negotiations for the Renton and Roxy Theaters, was any of that done by correspondence?

A No.

Q Was that all done by telephone?

A No.

Q How were the negotiations conducted?

A In person.

Q Was there any escrow entered into in connection with the properties?

A I don't know.

Q Did you ever sign any escrow papers?

A I wouldn't know an escrow paper if you showed it to me.

Q Did you sign any contractual agreements in relation to your purchase of the property?

A Yes.

Q Where did you sign those papers?

A In my attorney's office.

Q What attorney do you mean?

[46] A Mr. Burns.

Q Does he have the records of the purchase of the property?

A I don't know.

Q The copies that you signed, were they in his possession at that time?

A I think so.

Q When did you sign the documents?

A I don't know the exact date.

Q On the date you signed them, they were in his possession, were they not?

A Yes.

Q Do you know of anything that would remove those documents from his possession?

A He could have sent them to my office.

Q Did you make an inquiry of your office as to whether or not they were there?

A No.

Q In your original Complaint, you state on Page 5, Lines 18 through 21, that the defendants in their official capacities as aforesaid, have acted and/or threatened to act at plaintiffs' immediate and irreparable harm under color of authority. What type of irreparable harm?

MR. SMITH: We object to the reference to the original Complaint. The same paragraph is contained on Page 5 of the Amended and Supplemental Complaint which is the [47] only complaint that is now before the court, Lines 17 through 20.

MR. CLANCY: I note a difference between the documents, Mr. Smith. The first document is a verified document with Mr. Roger H. Forbes signing, Page 16, Lines 14 through 17, and Line 11, with his signature subscribed. It is a verified document although it has been superseded. I understand that you are saying it has been superseded?

MR. SMITH: Correct.

MR. CLANCY: It has no force and effect?

MR. SMITH: Essentially, it has no force and effect in terms of the issues before the court.

MR. CLANCY: But nevertheless, it would be a declaration of interest, would it not, because it was a document signed by him under oath where as I understand it, the Amended Complaint was verified by the attorney rather than the person whose deposition is being taken.

MR. SMITH: It was signed before a notary. It is more than just a verification.

MR. CLANCY: It was sworn before a notary, wasn't it?

MR. SMITH: Correct.

MR. CLANCY: And he says on Page 17, Lines 25 to 28, that he has read the Complaint to which this Affidavit is affixed and asserts that the factual [48] allegations contained therein are true and correct to the best of his information, knowledge and belief. As I read the Complaint, it is an affirmation on information and belief, but as sworn fact, so that the document which is sworn to, is a declaration of interest in which I am making inquiry into. Do you disagree with my right to examine him in that regard?

MR. SMITH: I don't disagree with your right to examine him about matters which you think are inconsistent with what he may have said or someone has said acting in the capacity of the corporation in the Amended and Supplemental Complaint, only in the sense that there may be some written declaration against the interest that he has exhibited in this lawsuit, but when you are talking about an allegation of the lawsuit which attacks the language of the original Complaint, I think you should refer to the Amended and Supplemental Complaint, unless there is other than a conclusionary assertion.

MR. CLANCY: The point I'm making is that he is swearing as a fact that there is irreparable harm.

MR. SMITH: You can ask him if he feels there is irreparable harm, and he says yes and he's under oath. He has sworn.

Q My previous question was, what kind of irreparable harm?

A Well, I have lost time. I have lost money. I have lost the [49] right to show constitutionally protected material.

Q You say you have lost time, you have lost money and you have lost the right to show constitutionally protected material?

A That's true.

Q Are there any other types of irreparable harm?

A That's the uppermost in my mind.

Q With respect to the time that you have lost, what do you mean you have lost time?

A A waste of time for me sitting here. That's money to me, also.

Q What do you value that time that you have lost here? How do you rate it, at so much an hour?

A No, because my life is only so long. I can't put any value on it.

Q Are you talking about the personal time that you put in on this project?

A That's right.

Q Would you give me an example of the amount of time that you have put in on this project and have lost that is irreparable harm?

A You want the amount of time?

Q Yes.

MR. SMITH: That's irreparable harm.

A Well, in my eyes, if it's five minutes or five days or five [50] years that I am kept from showing the type of material that I show in my theaters, that is lost.

Q When you say if you are kept from showing the type of material in your theaters, are you referring to the type of material that you have regularly been showing at those theaters since 1976?

A That's true.

Q I take it that to mean then representative of your loss would be your inability to show those particular films?

A Those films that are protected by the Constitution, that's right, that I have freely exhibited in this State since 1976.

Q But that's the type of films that you are saying you had a right to show at the theaters?

A That's right.

Q That is the type of film that you intend to show at the Roxy and the Renton?

A I intend to show that film at least in one of those theaters.

Q You mean that type of film or that film?

A That type of film.

Q When you say you are going to show it at one of the theaters, which theater is that?

A I would expect it to be the Renton.

Q Has that decision been made yet?

[51] A It's been made in my mind.

Q Then the decision in your mind is that you are going to show an adult film at the Renton?

A At the Renton.

Q And you are not going to show adult films at the Roxy?

A That's true.

Q With respect to your testimony in the two theaters previously mentioned, the Rainier and the Greenwood, your experience in the past has been that when you show nonadult film fare, it is not profitable; that is correct, is it not?

A That's not what I said.

Q What did you say in relation to those?

A I said that was true with the Rainier Theater but it was true on either policy at the Rainier Theater.

Q How about the Greenwood Theater, was there a different consideration there?

MR. SMITH: You mean the North End Cinema?

Q North End Cinema. Did you find that by showing nonadult motion picture films it was unprofitable?

A No, I didn't.

Q Did you find that it was profitable?

A I think it was profitable, yes.

Q Was it as profitable as at the Greenwood Theater? Did you find it to be as profitable to show nonadult motion pictures as to show adult motion pictures?

[52] A I did not have enough experience to be able to say over a long run whether that would be true or not. Looks like it could be.

Q What period of time are you talking about in your experience?

A I would guess probably two or three months.

Q How long did you have the Greenwood Theater?

A Two or three years, I think.

Q Was it only for that two- or three-month period that you showed nonadult motion pictures?

A Yes.

Q During what portion of that three-year period did you show nonadult motion pictures?

A At the end.

Q Do your records in relation to those shown indicate that you had any loss in revenues when you switched over from adult to nonadult motion picture films?

A Yes.

Q How was it reflected in there?

A Well, in that the policy of the theater was totally different under a general audience policy than it was under an adult policy.

Q Would you explain that?

A In that because of the location of the theater and the possibility of buying power for general audience films, [53] it was playing last-run films because that's all you could acquire there, and the admission price was substantially less. So the gross was substantially less, also.

Q Are you saying that your gross did drop when you changed from adult film fare to nonadult film fare?

A Yes.

Q I thought you had said previously that there was no change?

A There was a difference in gross.

Q Pardon me?

A There was a difference in the gross, but there is a number of other things that have to be taken into consid-

eration on the overall possibility of a motion picture theater.

Q Such as?

A In that if it is a general audience theater and it has a low admission price, you also have a higher concession take. So if you want to be fair, you have to take the whole thing in perspective.

Q Then are you saying that your income—

A You have to look—

Q If your income, although it dropped in gross from the admission, it picked up on the sale of concessions and that as a result of both of those sources of revenue, it equaled the income from your adult?

A I don't know that to be true because it wasn't a long enough period to be able to tell.

[54] Q Was it close to the income?

A I still say there wasn't enough time to be able to tell because you have to take it over a longer period of time than two or three months.

Q From just examining the box office receipts from the admission alone, has it been your experience that there is a marked drop in revenues of the theater when you switch from adult motion picture films to nonadult motion picture films?

A That wasn't true with the Rainier Theater. In fact, it was just the opposite, but it still was not enough to make the net.

Q Then you are saying that in the case of the Rainier Theater, your box office went up?

A With general admissions.

Q How long had you had the Rainier Theater?

MR. BURNS: The question has been asked and answered a long time ago.

Q My recollection of the testimony was you had it at least for a year and the nonadult was shown at the beginning; is that correct?

A No, the adult was shown at the beginning.

Q The adult was shown at the beginning for two or three months?

A Something like that.

[55] Q Then the nine to ten months was—

A A general audience.

Q Then the general audience fare for nonadult film was at least equal to that which you had received for the adult film; is that correct?

A In that situation.

Q Was there anything peculiar about that position, that situation that wouldn't apply elsewhere?

A I've never seen it happen before.

Q From your experience, you say that it doesn't happen like that?

A With my experience in the motion picture industry, I have never seen that happen before.

Q What has your experience shown then from your experience in the motion picture industry?

MR. BURNS: With respect to what? He's had a lot of experience in the motion picture industry. I object to the form of the question.

MR. CLANCY: He had just stated that the situation which existed at the Rainier Theater was such that the box office receipts for nonadult motion picture films was greater than for adult motion picture films in the situation in which there was a year's lease and in which films were shown during the first two or three months and nonadult films shown for the balance of the year, [56] or nine months. He then stated that his experience had shown that that did not exist as the usual result.

Q Based upon your experience, what have been the results that you have seen in relation to a comparison of the box office receipts?

MR. BURNS: Isn't it obvious? It's just the opposite of what happened at the Rainier Cinema. He said that's not been his experience. Isn't it obvious?

MR. CLANCY: It may be to you, but I'm asking him to tell me what his experience is.

MR. BURNS: I thought he had.

Q What has been your experience in that regard?

A My experience has been in every theater that I am aware of or I have operated that the box office results go up on an adult policy and down on a general release policy.

Q What theaters are you considering when you make that statement?

A I would take into consideration my experience with—the one that comes most to mind happens to be a recent acquisition which would be the Cinemond in Redmond.

Q How long have you owned the Redmond?

A Since January 1st.

Q Are you showing regular—

A I have never shown regular films there.

Q What type of films are you showing there now?

[57] A I show adult films there.

Q How was your experience related to the Cinemond?

A In that the reason that I was able to acquire the theater is that they no longer could gross any money in it showing general admission films.

Q Are you saying that you got the theater at a bargain price because it wasn't producing?

MR. BURNS: That isn't what he said, Mr. Clancy. You are misconstruing his testimony. Don't put words in his mouth.

MR. CLANCY: He is an employee of the plaintiffs in this action, is he not?

MR. BURNS: Don't misconstrue his testimony.

MR. CLANCY: Well, if I have interpreted his testimony incorrect, he can say that I have interpreted it incorrectly.

Q Mr. Forbes, are you the owner of the Redmond theater, the Cinemond?

A I am today.

Q At the time you purchased it—

MR. BURNS: Excuse me a moment.

(Discussion off the record.)

A I presume that when you asked me if I was the owner that you were referring to the corporation which owns the property.

[58] Q Yes.

A So when you said me, you were actually asking the corporation; is that true?

Q That's right. Kukio Bay—

A Owns the property.

Q And you own all the stock and are the director and officer?

A Right.

Q In that capacity, when you purchased the Cinemond, is it your testimony that it was losing money at that time?

A That's what the parties told me who were selling me the property, yes.

Q What else did they tell you about the box office experience of that theater in the past which would relate to your testimony here?

A That competition had destroyed, if for no better word, the business they were doing at the Cinemond playing general audience films.

Q Are you saying that they could not meet operating expenses?

MR. BURNS: Objection. That isn't what he said. It's a mischaracterization of his testimony.

Q Did the owner tell you that business was down?

A Yes.

Q Did he tell you that business was down to the point where he was not making operating expenses?

A I think he stated that.

[59] Q Did he tell you what his profit at that theater had been in the previous year?

A No.

Q Do you know what the nature of his profit was during the previous year?

A No, I don't.

Q Then when you make the comparison, would your grosses now at the Redmond with what was brought in during the past, what figures do you use on the previous operation for that comparison?

A Well, I don't use any figures in particular except in the conversations that I have had with him, he would express the fact that I was doing better than he had.

Q Have you had conversations with him since you purchased the property?

A Yes.

Q In those conversations, he has given you some indication as to what revenues he was able to produce before your operation began; is that correct?

A That's true.

Q What type of conversation was it, if you recall?

A I don't.

Q Did he give you any specific figures concerning what his grosses were?

A No, he didn't.

[60] Q Did you tell him what your grosses were under the new operation?

A Possibly in some general terms.

Q When you say possibly, are you saying that you do not recall whether or not you told him?

A I don't think that I gave him exact figures.

Q Do you recall giving him any figures?

A Yes.

Q What figures did you give him?

MR. BURNS: I object. What figures he gave him have no relevance to any issue in this lawsuit. I'll instruct him not to answer.

MR. CLANCY: Well, the relevancy is going into the question of damages and what damages he has suffered at Renton by virtue of the fact that he was forced to show nonadult motion picture films. Now he has sworn in the original Complaint that there was irreparable harm and I'm attempting to determine the amount or nature of the harm that he's talking about. His previous

expression was as to the receipts from each of the operations, and that's what I'm attempting to get into so that I can determine the nature of the damages.

MR. BURNS: Well, if you want to ask him what his damages are at the Renton theaters, that's appropriate. What he grosses at the Redmond theater has no relationship [61] to what damages he may or may not have at the Renton theaters. I'll instruct him not to answer.

MR. CLANCY: Yes, but the comparison of experience at the Renton between grosses for the two types of films would have some relevancy in this lawsuit.

MR. BURNS: Only if you can show that the markets are comparable.

Q Do you regard the market different in Redmond than it is in Renton?

A Yes.

Q What's the difference in the market?

A I think that there is a larger drawing area in the South End of the City of Seattle, and I can predicate that on the other theaters, the general release theaters that are located down here versus the general release theaters that are located on the East Side.

Q I'm not familiar with the area. Are you talking about the Renton area?

A The Renton area, yes, the number of general release theaters down here and the amounts they gross versus the general release theaters that are located on the East Side and the amount they gross.

Q On the East Side, is that Redmond?

A That's Redmond, yes. So I would say that there is a greater market in the South End than there is on the East Side.

[62] Q Is that the only market difference between the two theaters?

A So far as I can tell.

Q So if I understand your testimony, you are saying that in Renton, they are going to be drawing from a

larger geographical area for that type of film than in Redmond?

A That's what I would expect.

Q Does that apply to both nonadult and adult?

A I think that that is true.

Q Are you saying that in Renton, you will have a larger geographical audience for your adult films than you would have in Redmond for the same type of film?

A I think there is a larger market in the Renton area, the South End of what I might want to call Seattle, but even as a separate city, Renton, but the drawing area for Renton is larger than the East Side or the theater that's located in Redmond.

Q Does that apply for both types of film, for adult and nonadult?

A Well, the market for general release film is more cut up here in the South End. There are more theaters showing the same picture than there are on the East Side.

Q So you are saying that the drawing audience for nonadult films would be greater in Redmond than here?

A I don't think so. You'd have to look at a map and then I [63] could probably explain to you what the distribution pattern is on general release film and how it is done and how much they gross.

Q I suppose you are contrasting Redmond with Renton when you are showing the same identical nonadult film?

A Nonadult? Why don't we talk about adult?

Q For nonadult film, is there going to be a difference in the audience that you draw from and your receipts?

MR. BURNS: I'm going to object to the form of the question. We aren't talking about patterns for general release films in the Greater Seattle Area between the East Side and the South End of town. That has nothing to do with this lawsuit. Any hypothetical is not designed to lead to discovery of any relevant or admissible evidence with respect to this lawsuit, Mr. Clancy.

MR. CLANCY: Are you objecting then to an inquiry into the box office experience in Redmond as related to this lawsuit?

MR. BURNS: Yes.

MR. CLANCY: You are instructing him not to answer on that ground?

MR. BURNS: Yes.

MR. CLANCY: Then you have to strike from your experience the Redmond situation because you can't compare that.

[64] MR. BURNS: Mr. Clancy, he doesn't have to strike anything from his experience. I object to the form of the question, Mr. Clancy. I instruct him not to answer. You are not going to argue with this witness. He doesn't have to strike anything from his experience.

Q Let me ask it then in a more acceptable form. You stated that you expect irreparable harm as a result of the fact that you can't show adult films here in Renton?

A Yes.

Q You said that your experience shows that when you have gone from adult films to nonadult film, the box office drops; is that correct?

A I didn't say that at all.

Q What was your previous testimony then in relation to your experience of the change in the type of film from nonadult film to adult film?

MR. BURNS: Objection. It's been asked and answered. It's on the record. You have got it. Let's go on.

(Discussion off the record.)

Q You stated that your irreparable harm is that you cannot show adult motion picture films in the City of Renton and that has caused you harm. What type of harm are you talking about? Is it financial?

A Well, there is irreparable harm in my First Amendment right [65] to show that material, so by forbidding me to show it for one minute is causing the irreparable harm.

Q Then are you saying that no part of that irreparable harm is a loss in box office receipts?

A I am sure that that is harm that can be corrected.

Q That is damages?

A I think so.

Q Then what damages have you suffered in that regard?

A The amount of damages?

Q Yes.

A Well, right now I would guess off the top of my head the losses are running at the rate of about \$5,000 a week.

Q Is that for the Renton Theater or the Roxy?

A That's probably for both theaters combined.

Q Would you explain that?

A Would I explain?

Q Well, my understanding was that only one of those theaters are you going to show adult motion picture films?

A That's right.

Q Which theater is that?

A The Renton.

Q Has any part of that \$5,000 a week been due to a loss at the Roxy?

A Let me say that the policy that I have in mind for the Roxy I've divided because I am using the policy on both [66] sides of the street. If I were using it on just one side of the street, then I could foreseeably have gotten to the point now where I could at least break even at the Roxy but because I have divided the market for the type of policy that I have in mind for the Roxy, I have suffered a loss on both sides of the street. Does that make any sense to you?

Q Well, would you explain the policy you are talking about?

A The policy is that for a general audience, the admission price is \$1.99 for adults and 99 cents for children, and if I have one theater with that policy in it, I prob-

ably could be almost to the break-even point there, but because I have two theaters with that policy, I have divided my market basically and I am sustaining a loss on both sides of the street. That is because the Roxy and the Renton are right across the street from one another. That's what I'm talking about. So if I had adult films on one side of the street today, one, I would probably be making a profit there, and two, if I have this other policy across the street at the Roxy, it would probably be at least to a break-even point.

Q Assuming that you had a general admission price of \$1.99 and 99 cents, you would have concessions also?

A That's right.

Q Then would you still be operating the Roxy at a loss in [67] relation to operating costs?

A I don't know.

Q Has your experience been that a theater like the Roxy can be operated to show nonadult picture films and be at a break-even point from the profit standpoint?

A I don't know. I would feel that that's what I'll be able to do, but I don't know. I haven't had the opportunity to do it.

Q Has all of your experience in the theater business been practical, for example, going back to the age of sixteen, that you have been involved in motion picture affairs since that time?

A Yes.

Q Have you had any formal schooling in that regard?

A The formal schooling that I have had has been working for probably the best exhibitors of motion pictures in the United States.

Q What is your experience in that regard, your employment?

A I have done or had jobs in the capacity of from doorman to manager of theaters, from film booker, film buyer. There are few aspects of the motion picture industry as far as exhibition goes, that I haven't been involved in.

Q What is your formal education?

A High school.

[68] Q Where did you go to high school?

A Garfield in Seattle.

Q When did you graduate from high school?

A 1960.

Q What was your first employment in 1960?

A Well, I started in motion picture theaters before I graduated from high school.

Q What motion picture theater was that?

A I started—I don't know now.

MR. BURNS: Mr. Clancy, we already when through this and Mr. Smith objected, if you recall, and to the extent that he objected, I would renew the objection. We don't believe that going through a detailed history of every theater that Mr. Forbes worked in for the past 20 years or 25 years is relevant to any issue in this litigation.

MR. CLANCY: That's not my point. My relevancy is based upon his expectation of damage and his business acumen, his degree of education and his practical experience in the business.

MR. BURNS: He has answered all of those questions.

MR. CLANCY: Generally. Now I specifically want to know what his experience is.

MR. BURNS: He told you what his experience is, generally.

[69] MR. CLANCY: Well, I want to be specific and I'm going back to the point in his experience beginning with when he got out of high school and the nature of his business, what the extent of his expertise has been as a practical matter in the industry upon which he is basing his judgments on loss and this lawsuit.

MR. BARBER: If he is going to be presented as an expert and his expertise is going to be a foundation for that, it will be a line of inquiry into his experience.

MR. BURNS: That may be, but there has been no indication that he will be our witness on damages, has there?

MR. CLANCY: There is a declaration in here, that he has sworn that as a plaintiff in this action, he has suffered irreparable harm and damage. He himself says "I know facts and these have brought about irreparable damage or harm." So now I am going back and asking him what that harm is.

MR. BURNS: He has told you what the harm is which is denial of his First Amendment Rights, Mr. Clancy.

MR. CLANCY: I'm talking about monetary damages. If you want to instruct him not to answer, we'll go on from there.

MR. BURNS: Why don't you go ahead. Let's try to speed this up.

MR. CLANCY: Well, it's not being very helpful to [70] intervene here.

MR. BURNS: If you ask relevant questions, we could get this done a lot faster.

MR. CLANCY: If it's not relevant and you think you want to challenge it, you can instruct him not to answer.

MR. BURNS: I will and I have. I want to give you all the latitude possible, but I still want to get this done in a reasonably prudent amount of time.

MR. CLANCY: Are you instructing him not to answer?

MR. BURNS: No, I'm not instructing him not to answer.

Q Going back to your high school then, would you just briefly recite what your experience has been as a businessman in this field of motion pictures on which you rely in making your determination that there is financial damage occasioned by this ordinance in the City of Renton's action?

MR. BURNS: If it goes back to when you were sixteen years old.

Q Just tally it off as you want to, you went from where to where and what experience you've had.

MR. BURNS: That's a different question, Mr. Clancy.

[71] Q You said prior to high school, you were employed in the motion picture business. What was that employment, for how long and what did you do?

A I was originally employed—my first position was as a doorman at the Coliseum Theater when I was sixteen years old which was probably for a period of about six months. I returned to employment by the same corporation when I was eighteen years old as night manager of the Coliseum Theater. I moved from there to the assistant manager of the Paramount Theater and probably spent a year and a half with them at that time. Then there was a period of time that I worked for my father in a restaurant. Then I went to Boise, Idaho, and worked over there for two years managing a couple of drive-in theaters. I returned to Seattle, spent another little period in the restaurant business, then the majority of the time I worked for SRO which was five years, which I spent as a film buyer and booker. I then took a position working for a company that was operating the adult theaters in Seattle and spent five years in that. Then I formed my own corporation in 1976.

Q Of all your employment, how much of it dealt with employment in connection with adult motion picture theaters?

A 1971 forward.

Q Your first was that five-year stand prior to your going out [72] on your own; is that correct?

A Yes.

Q Who was that with?

A Who was that with?

Q Yes.

A The people that owned the theaters here in Seattle.

Q Which theater was that?

A I don't remember the name of the corporation.

Q What was the name of the theater?

A Garden Theater in Seattle.

Q Were you five years employed by the Garden Theater?

A And other theaters that those people owned, yes.

Q What were the other theaters that they owned?

A They had the Embassy, the New Paris, the Rivoli, and I don't remember what else.

Q Were all of those theaters owned by one corporation?

A I don't know for sure.

Q Were you paid by the corporation or the theater itself?

A I don't remember.

Q What position did you hold at each one of those theaters?

A Manager.

Q In what order?

A I don't remember.

Q What was the first of the theaters in Seattle?

A The Garden.

[73] Q What was the next one?

A I don't remember in what order they came.

Q When you ceased your employment with the Garden Theater, where did you go?

A I acquired it.

Q Was that the last theater that you operated before you went out on your own?

A No. I operated it on my own.

Q When were you employed by the Embassy Theater?

A I don't remember the period.

Q Was it prior to the Garden Theater?

A No.

Q Was it after the Garden Theater?

A Yes, in conjunction with.

Q At the time you owned the Garden Theater, were you also manager of the Embassy Theater?

A Probably also owned it at the same time.

Q How about the other two theaters that you were manager of during that five-year period that you mentioned? When did you become the manager of those theaters?

A I don't remember.

Q Did you also own those theaters?

A Some of them at a later date and some of them not at all.

Q Were they owned by you personally or did other people have an ownership in the theater?

[74] A They were owned by other people before I acquired them.

Q What other evidence of irreparable harm or damage were you referring to in that original Complaint when you signed it?

A I think I covered it.

Q Then you said there is a \$5,000 loss?

A Per week.

Q That's as to both theaters?

A I would guess that.

Q Is that a guess as to the \$5,000 or how do you come by that?

A It's a guess. We can probably substantiate it from the profit and loss statements of the theaters.

Q In making that determination of \$5,000, did you actually go through a mathematical determination to arrive at that \$5,000 figure?

A I think those are the figures that I have seen on our profit and loss statements.

Q Where are those profit and loss statements at the present time?

A They are in my office.

Q Have you brought them with you?

A No, I haven't.

Q The Subpoena informed you that you were to bring such papers with you, did it not?

MR. BURNS: Mr. Clancy, the Subpoena was directed to [75] Roger Forbes. The Subpoena was not directed to the corporations. The proper procedure under the Federal Rules of Civil Procedure to secure documents from a party is to serve a Request for Production of Documents which is returnable in 30 days. 30 days have not elapsed since the service of that document.

MR. CLANCY: It was my understanding that Mr. Forbes was testifying that those documents were under his control.

MR. BURNS: Those documents belong to the corporations, not to Mr. Forbes individually. You have only subpoenaed Mr. Forbes individually. You can't subpoena a corporation. You can subpoena management agents if you properly designate what matters they are to testify to.

MR. CLANCY: I understood his testimony to be that the \$5,000 a week was derived from a profit and loss statement that was in his possession and control and I was asking if he had brought it with him because it was in his possession or control and he said he hadn't brought it with him.

MR. BURNS: It is not in his possession or control. It is in the possession or control of the corporation, not his personal possession.

MR. BARBER: It should be noted that the Notices [76] of the Subpoena also were for Mr. Forbes individually and as President of those corporations.

MR. BURNS: But you don't get documents from a corporation by serving a Subpoena. If you do serve a Subpoena, it is to be treated as a Request for Production of Documents. You have not complied with the rules, Mr. Clancy.

Q Have you brought with you any other evidence of the damages suffered?

A No.

Q Can you tell me then from your own knowledge of those damages, what goes into the determination of that \$5,000 a week? How was that \$5,000 a week arrived at? Do you know any of the figures yourself now personally?

A I can't give you the exact figures, no.

Q Well, can you give me any indication of the manner in which those damages were calculated?

A Well, you take the expenses for operating the theater and you subtract them from the gross and it leaves

you with the amount that you didn't take in to cover the expenses and that's how we determined the damages.

Q Are you saying that you are now losing \$5,000 a week from the operation?

A That's right.

Q What are your operating expenses that you take into [77] consideration in connection with your gross?

A You take into consideration the rent, the payroll, the advertising and the rest of the miscellaneous expenses, the film cost, insurance, utilities.

Q From your experience, what would you expect those bills to be if you hadn't gone forward and shown adult motion picture films at those theaters?

A I would expect a gross in the Renton Theater would be someplace between five and six thousand dollars a week.

Q If that were five to six thousand dollars at the Renton, what would be the Roxy?

A Twenty-five hundred to three thousand dollars.

Q Is there any relationship that you have arrived at or shown by those figures, namely that the adult receipts would be twice what the regular would be for nonadult?

MR. BURNS: Do you understand the question?

THE WITNESS: I have a vague knowledge or indication in my mind of what I think he's driving at.

MR. BURNS: If you don't understand, ask him to repeat it.

A Tell me exactly what you want to know.

Q I notice that the gross for adults is twice your expected gross, twice what you would expect to be for nonadults?

A Right.

Q Is that some type of a factor that you have arrived at?

[78] A I try to compare this area with another area and if those things are true, then that's what the numbers will turn out to be.

Q Has that been your experience, that that is actually a two to one factor?

A It's not determined that way.

Q Is it just a coincidence that the expected gross for the Renton is twice the expected gross for the nonadult?

A Yes.

Q Then in trying to explain the increments that went into those two figures, would you then explain how you arrived at each of those?

A All right. I look at the Renton market or the South End of King County, whatever you want to call it, as being similar to the market of Spokane. The theater I have in Spokane grosses between five and six thousand dollars a week. Thus I would expect an adult theater in South King County or Renton to gross the same amount of money because you play to roughly the same kind of market. General release in the Eighties, the numbers I arrived at there are numbers that were given to me by the people who were booking the theater for me, SRO.

Q Are you saying that Spokane draws comparable?

A I would think so, that Spokane would be a comparable market to this area.

[79] Q Does Spokane exhibit adult film fare at the present time?

A Right.

Q You say that based upon your expected growth of five to six thousand at Spokane, you say you should expect it here?

A Yes.

Q Then how about the twenty-five hundred to three thousand dollars, how did you arrive at that figure?

A That figure was supplied to me by the people who were booking the theater for me, the theaters, the Roxy and the Renton, by SRO as to what I could expect to gross under that policy in that house.

Q But that had no relation to the Spokane Theater?

A No.

Q Is that based upon the fact that that would be expected as a gross of any theater in this area for showing that type of film?

A It depends on the policy of the theater.

Q What is the present gross at the Roxy Theater?

A About \$1100 a week.

Q Isn't it true that you could right now show any of the adult motion picture films if you so desired?

A I consider myself to be a law-abiding citizen. If I were to do that, I would then be breaking the law.

Q Well, isn't it your contention you would be shown that [80] you are not breaking the law in that you have that right to show those films at the present time?

A I do? Are you telling me that I wouldn't be cited for breaking the law if I went in there and showed them today?

Q Well, it was reported, I believe, that you indicated you were going to show Deep Throat and Devil in Miss Jones. Is that a correct statement?

A That's true.

Q Would Deep Throat and Devil in Miss Jones be the type of film that you would say was adult motion picture films to be shown at that theater?

A Yes.

Q Are you aware that the persons who assisted in the production of that film had been given a jail sentence under Federal law in connection with that film, as an obscene film?

MR. SMITH: Mr. Clancy, are you familiar with the fact that this is a community that is different than the community in Memphis, and under the Supreme Court Decision of Hamling, each community has the right to set the standards for itself and that those same films have been determined by a jury using the State of Washington law as community standards, not to be obscene. Do you know that, yes or no?

MR. CLANCY: It's not my deposition, Mr. Smith.

[81] MR. SMITH: Then I will object to him answering because it is not relevant unless you are prepared to admit and acknowledge that fact.

MR. CLANCY: In a deposition, you can object to the question or direct him not to answer.

MR. SMITH: I did both.

MR. CLANCY: You don't cross-examine the person who is asking the question.

MR. SMITH: I instruct him not to answer.

Q Mr. Forbes, I am going to go through a list of these items.

MR. SMITH: Which items?

MR. CLANCY: I am now referring to the Subpoena, the Deposition Subpoena to testify or produce documents, Items 1 through 11 on Page 1. Can we stipulate that he's read this document and he's been asked to produce Items 1 through 11 at this deposition?

MR. SMITH: We will stipulate that Mr. Forbes individually and corporately that a Subpoena in a Civil Action, No. C82-59M was served upon him on or about the 11th day of March, 1982, in which it was requested that he appear to have his deposition taken. Attached thereto was in essence a Subpoena Duces Tecum to produce the documents and records which must be done consistent with Rule 30 of the Civil Rules of Civil Procedure, that accordingly, that Rule 34 provides that under B, that the party upon [82] whom the request was served, shall serve a written response within 30 days after service of the Request. We ask the record to reflect that today is the 9th day and you are a couple of days premature. So to that extent, our response is that none of these records requested are present, none of them have been brought and that was done so on advice of counsel.

MR. CLANCY: The 9th day is what?

MR. SMITH: You are a couple of days premature.

MR. CLANCY: How many days premature?

MR. SMITH: If you served it on the 11th and this is the 9th, obviously it is not 30 days.

MR. CLANCY: That's under the 30-days rule?

MR. SMITH: That's correct, applicable under Rule 30 and 34 and which we told you about on March 11th.

Q Would you read Item 1?

MR. SMITH: We have produced none of the records set out by Items 1 through 11. Mr. Forbes has not done so upon advice of counsel.

Q Item 1, the Articles of Incorporation and all the Articles amended thereto for Playtime Theaters and Kukio Bay Properties, Inc., do you know where those documents are?

A No.

Q Are they in the possession of your attorney?

A I don't know.

[83] MR. SMITH: Mr. Clancy, we also filed a Response to the Subpoena Duces Tecum. After the 30 days have expired, as a matter of courtesy and not because we are required to do so, certain documents will be furnished you, including but not limited to those which are included in 1. If you will look at the response to the Subpoena Duces Tecum, we are telling you what we are not going to give you so that you can frame your issues and take it to court. Everything else other than specifically objected to will be produced as a matter of courtesy to you by Mr. Burns after the expiration of 30 days. Item 2, the books of account showing all capital investments and expenditures, do you know where those are located?

A I'll defer to Mr. Smith and Mr. Burns.

Q Are you saying that you won't give me an answer as to whether or not you know where they are located?

A I don't know.

Q Do you know where they are located?

A Not at this moment.

Q Item 3, the business records identifying all of the persons or entities owning stock in Playtime Theaters

and Kukio Bay Properties and the persons or entities holding the right to control the operation of the theater?

MR. SMITH: Mr. Clancy, all documents that are [84] required other than those specifically objected to, are in the possession of Mr. Jack Burns.

MR. CLANCY: Are you saying that all of these documents are?

MR. SMITH: All of the documents except those to which there is a specific objection, are in the possession of Mr. Jack Burns as attorney for the respective corporations.

MR. CLANCY: All right then, so that we will know regarding Items 1 to 11, would you tell me in relation to those Items 1 to 11, do you have Items 1 to 11 before you?

MR. SMITH: Except to the extent that they are specifically objected to and in response to your Subpoena Duces Tecum as set forth on Page 2. They are very, very specific. For instance, as to the Request No. 2, it calls for documents unrelated to the Roxy in Renton, plaintiffs object they are not relevant. That clearly sets forth what we are going to give you and what he would have in his possession.

MR. CLANCY: I'm asking about where the books of account are.

MR. SMITH: I said everything that it relates to the Request that we have not specifically objected to, are in the possession of Mr. Burns. Everything else [85] would be in the possession of the corporations involved in the case. Whether that would be at the office where the Palace is located or in Mr. Burns' office, they are still within the bosom of the corporation and the care, custody and control of said corporations.

Q So that we have the records straight, in relation to the Subpoena, just briefly take a look at Item 3, business records identifying, do you know where those records are?

A No.

Q Item 4, all leases, contracts, offers, or other writings of one or another nature by which Playtime Theaters and Kukio Bay properties and/or Roger H. Forbes claim or base an interest in the right to operate the Roxy Theater and Renton Theater, more particularly described in plaintiffs' Complaint. Do you know where those documents are?

A Not exactly.

MR. SMITH: As I indicated to you before, those categories of documents are within the bosom of Mr. Burns, 3 and 4.

Q Item 5, bank statements, ledger books, escrow agreements, cancelled checks, check stubs and checkbook registers showing all capital investments in the Roxy and Renton Theaters, more particularly described above. Do you know where those records are?

[86] A Not exactly.

Q Do you know where the bank statements are?

A Not exactly.

Q Do you know where the ledger books are?

A Not exactly.

Q Do you know where the escrow agreements are?

A Not for sure.

Q Are they at the principal place of business in Seattle, the address that was given to me earlier?

A Might be.

Q Are they in the possession of your attorney?

A Could be.

Q Are they in your possession?

A No.

Q Item 6, the names of all theaters which are owned, leased, or operated. Are there any other theaters which are owned, leased or operated by the plaintiffs Playtime Theaters, Inc., or Kukio Bay Properties or you other than the ones you have testified to?

A No.

Q Item 7, names of all motion pictures which were shown at the theaters owned by the plaintiff during the

period commencing November the 25th. Where would that information be?

A I don't know.

[87] MR. SMITH: As previously stated by Counsel, they are in the care, custody and control of the respective corporations involved and upon appropriate notice and an order of the court, we shall produce those.

Q Do you know where that possession is located? Are they at your office in Seattle?

A Could be.

MR. SMITH: They are at the office in Seattle.

Q Is there any other real estate that you do business at under Playtime and Kukio Bay?

A I have other real estate holdings.

Q No. Is there any other place in which you operate either those businesses than other than the principal place of business?

A No.

Q You have no other offices for either one of those corporations?

A No.

Q Do you have any other places where you keep the records other than at those offices?

A Yes.

Q What other places do you keep their records at other than at that main office?

A My accountant has records.

Q Where are those records kept?

[88] A Presumably his office.

Q Where is his office?

A In Seattle.

Q What's the name of your accountant?

A Benson and McLaughlin.

Q Other than the records that are kept by your accountant, are there any other places where the records of the corporations are kept?

A No.

Q Item 9, names and addresses of the distributors and licensors of the films, is that information kept at your main place of business?

A Some of it.

Q Where would the rest of it be?

A The buying and booking service.

Q Where would that place be?

A In California.

Q So it is in either of those two locations?

A Yes.

Q But some of it is at your place of business?

MR. SMITH: This relates to the period of time prior to January, 1982, and they are in the care, custody and control of the corporations and are on the premises of the corporate main office. Since January 1, 1982, the information you ask about distributors and licensors [89] would be in the care, custody and control of Mr. Richard Witte located at the premises of the Pussycat Theater in Hollywood.

Q Item 10 was all books, documents or things which may be introduced or used by you to establish facts to support your claim for damage or irreparable harm. Where would those books, documents or things be kept?

A This would either be at my offices or at my attorneys' offices.

Q Do you know what books, documents and things that the Subpoena refers to?

A I have a vague idea.

Q Would you explain your understanding of what it refers to?

A Well, I would presume that it is the records that we have to substantiate the claims.

Q You have actual records which will substantiate your claims, do you not?

A I think so.

Q You have been instructed by your attorney not to bring them here; is that correct?

A That's true.

Q Item 11, all books of account and records of whatever nature of Playtime Theater, Kukio Bay Properties, Inc. and Roger H. Forbes which project gross revenues, net [90] revenue, and damages alleged to have been or suffered by plaintiff. Would your answer to that be the same?

A Yes.

Q Your calculations and the documentary evidence you do have in your possession, do you not?

A I have it in my possession?

Q Yes.

A It's either in the offices of our corporation or in my attorney's office.

Q Your attorney just told you not to bring it to the deposition?

A Yes.

Q Mr. Forbes, could you tell us, please, who sold the Redmond Theater to you, the name and address?

A What's the name of the corporation we bought it from?

MR. SMITH: If you don't know, say you don't know.

A I don't know.

Q Has the title actually passed to you?

A As far as I know, to the corporation, Kukio Bay Properties.

Q Has the title to the Roxy Theater passed to the corporation?

A Yes, it has, to the best of my knowledge.

Q Can you give us the information of the seller and the address when you sign the deposition?

[91] A Yes.

Q Do you have that information in your possession?

MR. SMITH: It would be on the document that will be furnished after the expiration of the 30-day period by Mr. Burns as a matter of courtesy.

Q Who's the individual that you did business with in connection with the purchase of the theater?

A There was not one individual.

Q What were the names of the individuals that you did business with?

A McCray.

Q What's the first name?

A Bob and his wife.

Q Are there any other individuals that you did business with?

A No.

MR. BARBER: As I'm sure you are aware, under our Local Rules for District Court procedure, before we can go forward with the Motion to Compel Compliance for the documents that we have sought to have produced here at the deposition today, we are required to see if we can meet outside of the formal courtroom setting and reach some sort of an accommodation as to those items which you are objecting to production. I would like to see if there is a time that we can stipulate to which [92] would be convenient for both sides to sit down and meet to discuss your objections to our Request for Documents outlined in the Subpoena Duces Tecum.

MR. SMITH: I think it would be more appropriate to what degree do you feel that our objections are not well taken and to that degree that you prepare some pleadings directed to that. Then I think we are in a position to sit down with you, whether it would be one week or two weeks, and address the specific issues. We have told you why we think they are objectionable. Now what is your response? We cannot sit down with two or three days' notice. Is that correct, Jim?

MR. BURNS: Yes.

MR. SMITH: After you have furnished us with your revised Request or at least your response to our specific objections.

MR. CLANCY: All right. Why don't we adjourn the deposition upon the outcome of the settlement of this Subpoena Duces Tecum.

MR. SMITH: All right. No questions.

MR. CLANCY: The deposition is concluded and resume it depending upon the outcome of the settlement of the Subpoena Duces Tecum.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

—
No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiff,

vs.

CITY OF RENTON, *et al.*,
Defendants.

—
DEPOSITION UPON ORAL EXAMINATION
OF ROGER H. FORBES

BE IT REMEMBERED that the Deposition Upon Oral Examination of ROGER H. FORBES, appearing as a witness at the instance of the defendants, was taken at 10604 Northeast 38th Place, Suite 105, Kirkland, Washington, beginning at the hour of 10:00 o'clock a.m., on May 27, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

ROBERT E. SMITH and JACK R. BURNS, Attorneys at Law, appearing for and on behalf of the plaintiffs;

LAWRENCE J. WARREN, JAMES CLANCY and MARK BARBER, Attorneys at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and testimony taken, to-wit:

EXAMINATION INDEX

Counsel	Page
Mr. Warren	4-51
Mr. Burns	51-52

EXHIBIT INDEX

Plaintiff's Exhibit No. 1	Packet of Documents	52
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[2] MR. WARREN: This is the deposition of Mr. Roger Forbes. I guess technically it is not a continuation, but a reconvening of Mr. Forbes' deposition. On the prior deposition, there had been a Subpoena Duces Tecum and for this deposition, it was basically a Subpoena Duces Tecum with respect to three or four items off of the original Subpoena. Is my understanding correct?

MR. BURNS: Yes.

MR. WARREN: Those were contained in Items, if I have the numbers correct, 5, 10 and 11 off of the first Subpoena, and that's all that is being produced today.

MR. SMITH: As per the request.

MR. WARREN: There was an additional item of any and all market analyses, solicited, sought or obtained. Is that also being produced today?

MR. SMITH: As Mr. Burns indicated, there are no such.

MR. WARREN: Our understanding was from our conversation that there may have been some and you are stating for the record now there are no market analyses?

MR. SMITH: Yes. What you are asking for is [3] market analyses solicited, sought or obtained by plaintiffs. That would exclude any seat of the pants market analyses which an individual seeking as an entrepreneur for the business in which he is connected, to look at and say, "Hey, I'm going to check the traffic patterns here."

MR. WARREN: For the record, I understand that the prior Subpoena has been objected to on a number of instances and any discussion of that is not truly the subject of today's deposition?

MR. SMITH: Right. In my opinion, the objections were discussed and merged into the Subpoena to which we have responded today. Of course, we have the additional grounds that under the Federal Rules of Civil Procedure, there must be a 30-day notice given and that they were called for a time several days prior to the expiration of the 30-day notice. Technically, any documentation furnished at the time of the original deposition

was gratuitous and voluntary and not in response to the Subpoena.

MR. WARREN: If my recollection from the prior deposition, having read it last night, is correct, there was an agreement that the requested information would either be objected to or produced within that 30-day period.

[4] MR. BURNS: And it was.

MR. WARREN: Your statement is that everything that has not been objected to has been produced or will be produced today?

MR. BURNS: Yes.

MR. SMITH: Having done all that, do you want to take a few minutes before we start and look at all this stuff?

MR. WARREN: I have a series of questions that I wish to inquire into before we get that far.

ROGER H. FORBES,

who having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARREN:

Q Mr. Forbes, if any of the questions I ask are not clear to you and your attorneys don't object for some reason, let me know because I'm not trying to confuse you. This is a discovery deposition. I'm trying to elicit information so I may understand the facts in the case. Your deposition was taken previously in this case on April 9, 1982. Do you remember that?

A Yes.

Q Since that point in time, we have had produced for us, certain documents about your businesses. I'm asking you [5] these questions as the chief operating officer of Kukio Bay and Playtime. If I understand the documents correctly, you purchased through a stock purchase or

other means, the predecessor corporations to Kukio and Playtime. Is that a correct assumption?

A No, that's not.

Q Would you explain to me how you came by the predecessor corporations to Kukio and Playtime?

A If my memory serves me correct, they are both the same corporations. The only thing that was changed was the name.

Q You bought what was known as Peninsula Corporation, I believe?

A That's right.

Q And you changed the name of that to Kukio Bay?

A Right.

Q You purchased another corporation, the Gaiety, I believe?

A No.

Q What was the name of the prior corporation, do you recall?

A The corporation was originally called Gaiety Theaters, Inc., but it is the same corporation. It just had a name change.

Q You changed the name of that corporation to Playtime?

A Yes.

Q Let's explore for a second the relationship between [6] Kukio and Playtime. It is my understanding, and correct me if I'm wrong, that Kukio was basically a corporation that invests in real estate and its principal investments right now are a number of pieces of real estate that have theaters upon them. Is that a correct assumption?

A The majority of it, yes.

Q Is there other real estate in Kukio Bay other than real estate upon which theaters or their appurtenances such as parking lots sit?

A Yes.

Q Can you tell us what that is?

A There is an apartment building in Renton. There is some vacant land in Point Roberts. There is some vacant land on Aurora. There is a house in Port Roberts.

Q Are these other items of real estate contiguous to your theater properties?

A Not always.

Q So there is some real estate investments that are completely separate and apart from theater properties?

A Yes.

Q Kukio as a method of doing business has turned around and leased various properties to Playtime?

A Yes.

Q Is there any theater that Kukio Bay owns that is not leased to Playtime?

[7] A Not currently.

Q The two theaters that we have been discussing located in Renton is the Renton and the Roxy, have been leased by Kukio Bay to Playtime; is that right?

A Yes.

Q The lease rate is \$4,000 a month, if I understand?

A I guess that's right. I'm not sure.

Q I don't mean to misstate a fact. That's what I reviewed today from the documents that have been produced and if that is an incorrect statement, we will modify it later.

A If that's what the documents say, that must be what it is.

Q Has Playtime been paying the money to Kukio Bay each month for the lease?

A To the best of my knowledge.

Q Is Kukio Bay claiming any economic loss in this particular action because of the Renton ordinances outside of any attorney's fees that may have to be paid?

A I don't know.

Q Let's approach it from this standpoint. Do you know of any economic losses of Kukio Bay which would or could suffer because of these ordinances when you take

into account that they have been receiving the \$4,000-per-month rental on each theater?

A Well, I said to the best of my knowledge, but if—and I would say that because of the ordinances, it makes the [8] overall corporation that is leasing all of the theaters, makes it difficult to pay their bills.

Q That's playtime, though, is it not?

A Right, and part of those bills that are owing are for other properties. Whether Playtime is paying Kukio and keeping current in Renton or not in other areas, I'm not really sure.

Q What I'm trying to get at obviously is the loss then would fall into Playtime's pocket and then it would then owe money to Kukio?

A Right.

Q Do you believe that the terms of the lease as they exist on these two theaters are at the market rate, if you know?

A Absolutely.

Q That has been the effort that Kukio has taken in the past, is to have market rate leases?

A Yes.

Q Was there any efforts to lease the theaters to any other third parties outside of Playtime?

A Yes, there was.

Q Can you tell us what you did about trying to obtain third parties briefly, and maybe a couple of names of who you contacted?

A There was a discussion over leasing one of the theaters to Seven Gables Corporation.

[9] Q What came of that?

A Nothing.

Q Did it ever get beyond just the preliminary discussion?

A No.

Q Can you tell us if you recall why Seven Gables wasn't interested in the theater?

A Well, I can't tell you because I don't know what goes through their mind.

Q Did they express to you why or did they just say "No, we're not interested"?

A They approached me originally and I gave them the figure of what I felt was a fair rent, and that was the end of the discussion.

Q They didn't seem too excited about it?

A No, but they are paying similar figures in other areas.

Q Can you recall what figure you quoted them as a fair rent on the theater?

A \$4,000.

Q Mr. Forbes, obviously this controversy is about your desire to show what you have termed as adult motion pictures in one or both of the theaters in Renton. I would like to explore with you a little bit more how your chain of theaters operates and your film selection. I would like you to explain to me, if you could, how you schedule a film or someone in your corporation schedules [10] a film into a specific theater. Could you tell us how that is done?

A I don't do it.

Q Who does it for you?

A No one within my corporation does it.

Q We had some discussion previously about the Pussycat Theater and a gentleman down in the Pussycat Theater reviewed your films, a Dick Witte?

A Dick Witte is retained as the film buyer and booker for Playtime Theaters, Inc.

Q He also schedules which film is going to be played in which theater at various times?

A That's true.

Q You have no control over that?

A No.

Q And no knowledge of how it is done?

A No.

Q From your knowledge as the chief operating officer of Playtime, can you tell me whether or not any of the theaters have the same showing patterns, in other words, one movie will show in Theater A and Theater B at the same time. Do you know that?

A Yes.

Q Could you tell me if that happens?

A It does.

[11] Q Is it done as a matter of a pattern that you are aware of?

A I would assume that we are and when I say we are, Dick Witte and the people who work for me are working to put together the best units of theaters to exhibit the same motion picture at the same time to get the best coverage by the advertising campaign for your dollar spent.

Q Some movies as they come out, for example, might be hot items and might have a certain market appeal. Do you know whether there is an attempt to spot those movies in each one of your geographical locations at the same time?

MR. SMITH: Object to the term hot item. I don't think that's a word of art in the trade and ask that you rephrase the question. I instruct the witness not to answer.

* * *

[13] Q Mr. Forbes, are there certain movies in your industry that seem to draw better at or about the time of their release?

A Yes.

Q They have a particular drawing power at that time?

A Some of them have drawing power ten years later.

Q Do you know whether or not Mr. Witte attempts to book those items that might have particular market appeal because of their novelty or other reasons, into your theaters in some sort of a geographical manner, in other

[14] words, one in each city where you have a theater?

A I have no knowledge.

Q Do you have any knowledge as to whether or not that proves to be the case with a number of films, they end up being placed in each of the theaters that might be in a specific geographical location like one in Seattle, one in Pasco, one in Spokane, and so forth?

A I don't know.

Q Let me ask you this question, then. Is it true that eventually the films that are being shown throughout your system eventually are shown in each of your theaters?

A That is not necessarily true.

Q So there may be a film that's shown in Spokane that would not make it to the Redmond Theater?

A That's true.

Q You have no information about how the pattern is constructed to show those particular movies?

A No.

Q Do you have any knowledge, Mr. Forbes, of what movies were to follow in Renton after the Devil in Miss Jones and Deep Throat were to be shown in January?

A No, I don't.

Q No knowledge at all?

A No.

Q Who has that knowledge?

[15] A I imagine you would have to inquire of Mr. Witte.

Q From your knowledge of your theaters, would it be a fair statement that the majority of the films that were shown in Redmond would end up being shown in Renton if it was permitted to open?

A I would guess that would be true.

Q And a similar statement for, say, Spokane or the Seattle theaters, the majority of the films shown in those theaters would be shown in other theaters at some point in time?

A I don't know whether it would be shown in Renton or not.

Q The majority?

A I don't know.

Q You just don't know very much about this system?

A I don't know very much about the way he does it, no.

Q Do you keep track of what theaters are showing what films in your organization?

A I don't personally keep track of them.

Q Let's reflect back in time if we can to, say, December and January of 1981 and 1982 respectively when you were considering coming into the City of Renton and buying the two theaters. Did you make any sort of inquiry to the City as to whether or not they had an ordinance which might have prevented the showing of your adult motion pictures in the City of Renton?

[16] A I sure did.

Q You determined that there was an ordinance in effect at that time; is that correct?

A Yes.

Q Did you make any inquiries to the City of a formal nature to determine whether or not the enterprise which you were proposing would violate that ordinance?

A I didn't inquire of the City, no.

Q Your answer leaves me with the implication that you inquired of somebody else, is that the case?

A Normally, questions of legality are discussed with my attorneys.

Q Did you make any inquiries of a formal nature to the City of Renton outside of an application for a business license?

A Well, we certainly got a copy of their ordinance before we purchased the theaters, I would believe.

Q Did you discuss or inquire of the City about any other locations within the City Limits of the City of Renton outside of the location of the Renton and the Roxy Theaters?

A No.

Q Were any other locations considered at all?

A There aren't any other theaters available in Renton, to the best of my knowledge.

[17] Q Is it your statement that the only way you were coming into the City of Renton was that you would buy any existing theater?

A It is better to go out and purchase an existing theater than to build a new theater.

Q But that certainly is still a viable alternative, is it not, to build a theater at another location?

A In another location in Renton?

Q Right.

A It depends on whether there is a place that's available where the property could be purchased at a reasonable price and whether construction could be done to where you can get a return.

Q My question is, did you do that process at any point in time?

A We have since.

Q In Renton?

A Yes.

Q Can you tell me who has participated in that inquiry?

A I don't know the people's name right offhand.

Q As the Chief Executive Officer, have you hired any individuals to testify in your behalf concerning that information?

A I'm sure that there is somebody who has done that work, yes.

[18] Q You don't know their names?

A No.

Q Do you know the name of the organization?

A No.

Q Do you know the type of work that they do? Are they planners, engineers?

A They are in real estate.

Q Anyone else outside of an individual strictly in real estate?

A No.

Q When you say in real estate, are they strictly real estate agents or brokers or are they management consultants or what are their qualifications, do you know?

A I really don't know.

Q Who would know that information outside of yourself, Mr. Forbes?

A My attorneys.

MR. WARREN: Counsel, can we agree on the record that you will provide me with the names of those individuals?

MR. BURNS: If they are properly requested.

MR. WARREN: In other words, without the proper request, we are not going to get the information? I just want to know.

MR. SMITH: It falls within the same category, [19] the request for the map that your employee in the City prepared that was refused us at the time of the deposition.

MR. WARREN: That's argumentative, and I would ask the question again. I don't think names are protected information. Are we going to be provided with the names outside of a formal request and it can be answered with a simple yes or no.

MR. SMITH: I think the answer has been made for the record.

MR. WARREN: In other words, no answer is going to be given of a yes-or-no fashion?

MR. SMITH: It may not be what you choose, but I think the record speaks for itself.

(Discussion off the record.)

Q Just so I understand, Mr. Forbes, you have identified one individual that has some expertise in real estate that you believe that you paid some money to, to prepare—

A I have delegated that to my attorneys to pursue and they are doing it.

Q Have you been signing some checks for the preparation of this information?

A Well, I pay a great deal of money to my attorneys, and I presume that part of that will be paid out to these people.

[20] Q Just so I understand your answer, you have not been signing checks directly to these individuals but have been paying money to your attorneys for that purpose, you believe?

A That's right.

Q Mr. Forbes, let's try and discuss for a minute if we can the damages claim that you have asserted in this action. I seem to be a little confused about how the damages are to be arrived at. Reading your prior deposition, I was left with the impression that you were comparing the Renton Theater to the theater in Spokane. We had a discussion off the record that indicated there may be another method being used. Could you please educate me on the damages calculations, if you would, please, how are the calculations being done, what method is being used?

A Are you asking me—for one thing, I can't think of any way to compensate me for the loss of right to show protected material. I don't know how to tell you. There is no dollar-and-cents figure on that.

Q I presume at some point in time, your attorneys on your behalf are going to approach the court and say "We want to be awarded X number of dollars plus our attorney's fees for this action," and my inquiry to you is, do you know the method used to calculate the X number of dollars? Is it going to be a comparison of the profitability of [21] some of the theaters with a theater that was to show adult entertainment in the City of Renton?

A If you are talking about dollars and cents, in that regard I would presume that it will be based on the performance of the theater.

Q The performance of the theater based upon what standard? What are you using as the standard?

A This is what it does that it does today versus what it does after it is showing the type of material that we plan to show there.

Q So my understanding is, you are going to anticipate presenting your damage claim at some point later in time after these theaters have been allowed to operate, is that what you are saying?

A If I had a crystal ball, I would say that the time frame between a preliminary injunction and the final outcome of the case will be the right period.

Q Presume for the sake of this next question that you are not able to prevail on the preliminary injunction. Do you know whether there has been another calculation of damages done that uses some other standard outside of performance before and after the injunction?

A No.

Q No, you do not know, or no, there is not?

A I don't know.

[22] Q Has there been any calculations that you are aware of comparing any theater, other theater in your chain, against the Renton Theater for comparison's sake for damages?

A Well, there probably are in my own mind, but beyond that, no.

Q Do you believe in your own mind that you can somehow come to a damages calculation based upon your knowledge of some other theater in your chain versus this theater?

A I probably could, but I still believe the best method and the most fair and equitable one is the before-and-after performance of that theater itself.

Q If you are not able to use that measure, can you tell us what theater you would be comparing the Renton Theater with?

A The Dishman.

Q The Dishman is a theater that is located in Spokane?

A That's true.

Q Can you give me some idea about the Dishman Theater as to its location, within whatever metropolitan area it might be? Where is the Dishman Theater located?

A It is located in Spokane.

Q Is it in the downtown area or is it in a suburb?

A It's in a suburb.

Q What suburb is that?

A The Dishman suburb.

[23] Q How many seats does the Dishman Theater have?

A 400.

Q Can you explain to me the parking setup around the Dishman Theater? Is there on-site parking?

A More or less.

Q Can you explain "more or less" to me, please?

A Well, there is some parking adjacent to the theater which it shares with some other businesses.

Q Can you tell me how many parking spaces are available with that parking sharing arrangement?

A No, I can't.

Q Do you have some sort of an agreement with the adjoining businesses?

A I think so.

Q Is that a written agreement?

A Not to my knowledge.

Q Can you tell me if it is an oral agreement, if there is compensation paid for the parking sharing?

A No.

Q How many businesses share the parking, and give me some sort of an idea of the size of the parking, number of stalls or numbers of square feet, something of that nature?

A I really don't know to tell you the truth. There is probably parking in the immediate vicinity for a hundred cars.

[24] Q How many other businesses utilize that same parking area?

A I haven't been there for a period of time but I would imagine there are half a dozen, but I'm just guessing.

Q Do you have any knowledge of the time when those businesses would use the parking spaces? In other words, are they nine-to-five type businesses?

A Some of them are open before I am in the day and are open after I close.

Q What are the other type of businesses there, if you know?

A Well, there is a gun shop, there are taverns and there are restaurants.

Q Is there another theater in the locality showing adult motion pictures?

A Yes, there is.

Q How far is it?

A It is located in Downtown Spokane.

Q Can you give me some sort of an idea how far that is?

A I'm not very good on distances.

Q Can you tell me how long it would take to drive from one location to the other?

A 10 or 12 minutes is a guess.

Q Is there more than one adult motion picture theater in the area outside the one you discussed in Downtown Spokane?

A No.

[25] Q So in Spokane, it is limited to two theaters?

A Yes.

Q Let's discuss if we could the Redmond Theater for a few minutes. Can you tell me the size of that theater, the number of seats?

MR. SMITH: Objection as to materiality, but you may answer if you choose.

A What do you mean by size?

Q How many seats?

A I think there are about 300.

Q Can you tell me whether there is parking with the theater in Redmond?

A There is some shared parking in front of the theater.

Q How many stalls are there?

A I would guess that for all the businesses there, there may be 50 or 60. I don't really know.

Q What is the distance, if you know, in driving time or whatever measure you want to use, between the theater in Redmond and the next closest adult motion picture theater?

A Well, I would guess that the next closest one would have to be the Apple Theater on Boren in Downtown Seattle.

Q You seem familiar with the number of adult theaters in the King County locale. Could you tell me how many adult motion picture theaters that show primarily adult motion [26] pictures there are in the King County area here?

A I would have to sit here and try to figure how many there are. I don't know right off the top of my head.

Q You have what, four?

A Well, in King County we have the Cinemond, the Palace, the Embassy; then there's the Apple and the Mid-Town. What else is in King County? There is one in Des Moines. What have I missed?

Q Is there anything in the North End?

A The North End of the City?

Q Yes.

A We haven't gotten into the North End yet.

Q Let me ask you this question without asking you to divulge any big corporate secret. Could you tell me which of the theaters in your enterprise is the most profitable at the present time?

A Could I tell you?

Q Yes.

A I don't know which one is exactly. There is a number that are running neck and neck.

Q Could you tell me what the runners are then?

A The runners are the theater located at Third and Union, the Embassy, and the theater in Point Roberts, which is an interesting situation.

Q Could you tell me where Point Roberts is?

[27] A Point Roberts is a little tip of land that you have to go through Canada to get to, that's part of the State of Washington.

Q Up near Bellingham?

A Yes, around the Bay. In fact, everything that goes into Point Roberts, which has 250 people as a year-round population, comes from Canada.

Q Can you tell me about the Point Roberts theater, how large that theater is?

A A couple of hundred seats.

Q 200.

A 200.

Q Does that have its own parking?

A Yes.

Q Approximately how big?

A Probably parking for a hundred cars.

Q How far is that from Vancouver?

A Driving?

Q Sure.

A 20 minutes, 25 minutes, 30 minutes, someplace in there.

Q Maybe depending on how the border fellows are treating them that day?

A They just kind of wave them through.

Q You mentioned the Embassy. That is a theater that has been in existence for a long time, has it not?

[28] A Yes.

Q It is at Third and Union?

A Yes.

Q That's one of your more profitable enterprises. How many seats are in there?

A 600.

Q There is no outside parking for that theater, is there?

A That's true.

Q Can you tell me the average number of patrons that you draw, for example, at the Embassy? Is there

some sort of a routine? Do you draw the same audience that comes to theater films?

A Well, the type of patron who goes to the Embassy Theater varies greatly from the type of patron that goes to most of the other theaters, and it is a steady patronage, week in and week out.

Q I think I read from your deposition or perhaps in a newspaper report that you believe that the patrons that see general-run movies are, say, 30 and under as a general rule, and the patrons that see your movies are over that age as a general. Is that a fair statement?

A I think that the—at least what I know about the exhibition of motion pictures, that general audience films today are geared for people from 12 to 28 and the type of patrons that we have for adult films run [29] from their early Twenties up.

Q You just made a statement that you seem to draw from the same clientele through the door. Is it a steady business? In other words, is there really not very much variation in the number of people you draw?

A In some locations that's true, but not in all locations and certainly not in the new additions that we are making.

Q Let's take first the Embassy. Do you draw, for example, at the Embassy a pretty steady crowd of the same people?

A I would say that because the theater is located right in Downtown Seattle, that a lot of people go in there. It does a lot of day business because it is close to the different offices and things around there.

Q Do you know whether or not your attendance figures remain fairly constant for the Embassy?

A They don't vary a lot.

Q Can you tell me some sort of a measure, how many people will you draw a week or a month?

A In a week, probably 1500.

Q Is that the highest number you draw in any of your theaters as an average?

A Yes.

Q Is anybody even close?

A Point Roberts is close.

Q Can you give me a rough estimate on Point Roberts?

[30] A I imagine that's pretty close to the same number. It's hard to tell because where the Embassy Theater is, it is a theater that has a typical male clientele. Other theaters where we have couple rates and we have a different price on couples, I remember the gross figures, but I don't remember the people count. You can throw yourself off a lot that way on the number of people that go through the door.

Q Your prior testimony was of these two theaters, the Embassy and the Point Roberts, were pretty close?

A Yes.

Q Where does the Dishman fall?

A It is just under those.

Q It is maybe the third runner?

A It might have the same number of people, but it won't gross as much because there is more couples and the admission price for a couple is \$9.00, whereas for a single, it is \$6.00. You follow what I'm getting at?

Q I understand. Could you tell me how the Redmond Theater is doing?

A It is doing just fine.

Q I notice some statements that would indicate when it opened, it was doing—to use a term of art—a land-office business. Is my impression of that correct, it did very well when it opened?

[31] A Yes.

Q As many new businesses do, it has backed off a little bit since that point in time?

A Yes.

Q Can you give me a feeling of how many patrons that theater is drawing?

A Right off the top of my head, I can't.

Q Can you compare the gross for the theater with that of the Dishman, the Embassy and the Point Roberts Theater, just where it lays?

A I think it probably does 50% of the Embassy's business.

Q Do you have any theaters that you are operating right now that are losing money?

A Yes, I certainly do.

Q Outside of the Renton and the Roxy, do you have any theaters in your chain that are losing money?

A No.

Q Are there any that are close to the line?

A No.

Q Can you tell me what the worst performer is?

A The Renton and the Roxy.

Q Can you tell me the theaters that you have that are showing adult fare which is the poorest performer?

A Which is the poorest performer?

Q What one brings the fewest dollars to you?

[32] A Well, there is a problem with the way you are framing that in that there are a lot of variables in the business, and variables are things that are based on the amount of film rental you must pay for one location versus another, the amount of rent that is paid, so a theater could do a lot of business and theoretically not make any money because of some of these other factors.

Q Could you analyze from what you have just discussed then, on net, which one is the poorest when you take into account all of the factors you have been discussing?

A Probably my greatest disappointment these days has been in Bremerton.

Q That theater is what?

A The name?

Q Yes.

A The Grand, but that could be because the theater is brand new and we are just getting it established. It seems to be turning about.

Q From your statement, I was left with the impression that despite the fact that it is not doing as well as you expected, the Grand Theater in Bremerton is still making money, is that correct?

A Yes.

Q Have you see any pattern? Is it beginning to make more money as time goes on?

[33] A Yes.

Q Is this an unusual pattern for a new theater, to start out slowly and then gain momentum?

A No.

Q Apparently the theater in Redmond took the opposite approach and made a lot of money up front and then has fallen back to a more normal pattern?

A Well, it depends greatly on the situation, like Redmond, on the film that you are playing. There hasn't been any Raiders of the Lost Ark or Star Wars in our business around lately.

Q I presume from your statement that there are Raiders of the Lost Ark in your business?

A You betcha.

Q Such as?

A Such as—.

Q May I suggest one to you. Is Deep Throat a Raiders of the Lost Ark?

A I guess there is some pictures in there that would qualify.

Q You have just handed me something, Mr. Forbes. Do you know what this is?

A I saw some titles on there and they would certainly qualify as pictures of Raiders of the Lost Ark.

Q Such as Behind the Green Door?

[34] A Yes.

Q The Evil Ways of Love, did that make it?

A A good picture.

Q From a profit standpoint?

A Yes.

Q Or for artistic content?

A Probably both.

Q Count the Ways?

A Made by a local Spokane girl.

Q Was it a Raiders of the Lost Ark?

A It sure was in Spokane.

Q Danish Pastry?

A Good picture.

Q Another Raiders of the Lost Ark?

A Not quite, but a very profitable film.

Q Deep Throat?

A Deep Throat was a great picture.

Q Devil in Miss Jones?

A You betcha.

Q Autobiography of a Flea?

A That was a good picture.

Q It seems like we have a lot of Raiders of the Lost Ark. Are there a lot of heavy drawers in this particular area?

A More so every day.

Q Do you think that's because of the films themselves or of [35] the general subject matter that draws people, without relationship to the quality of the film itself?

A I think it has to be the films themselves today.

Q Are the patrons of adult motion pictures becoming more discerning?

A You better believe it.

Q I recall from the time that I was in college—this may be an editorial comment—that it seemed that Deep Throat was a national phenomenon?

A It still is.

Q That it was the first adult motion picture that seemed to draw a general popular response. In other words, it was the thing to go see?

A That's what it became.

Q Has it been the impetus, for these types of movies from your experience to draw the people in?

A Good pictures do more business today than they ever have, drawing a wider audience than they ever have. We also have pictures today that don't mean any-

thing. At one time, this business probably was very stable. It didn't have the ups and downs of general release pictures, but it certainly has the ups and downs today.

Q Mr. Forbes, I want to go back to the damages aspect of this thing again. Your desires, I understand it, would be to compare before and after with the particular theaters [36] in Renton. The Renton Theater is the one that's to show the adult motion pictures?

A I would presume that, yes.

Q When you say the before and after, are you speaking of the growth of the theater or the net profit to Playtime?

A Net profit.

Q Are you speaking of net profit before and after such home office expenses as salaries and your salary as President, and whatever directors' salaries might be paid out?

A Well, I would presume that we would apply the same principles that we have before as we will after.

Q I wasn't involved in those before. I am here and I don't have knowledge and I'm asking you to explain it to me. To the best of your knowledge, is your salary as the President of Playtime debited out of the net profits before you make your damage claim, do you know?

A I don't know.

Q Can you tell me whether or not Playtime as a corporation made a profit in each of the last three years?

A I don't know.

Q Who knows that information? Is that Benson & McLaughlin?

A I would presume, yes.

Q Do you recall as the sole shareholder of Playtime Theaters whether or not you were paid any dividends from that corporation over any of the last three years?

[37] A Dividends out of that corporation, no.

Q Do you know whether Playtime has paid any income tax over each of the last three years?

A I don't know.

Q You don't remember signing a big check to the IRS for Playtime?

A I really don't remember.

Q That would be the kind of thing that would attract your attention, would it not?

A Signing any check attracts my attention.

Q But you don't recall whether or not you paid income tax?

A I don't remember.

Q Would you have recalled that if it was a sizable amount?

A Well, it depends on what you think a sizable amount is. To me, \$5.00 might be.

Q Let's discuss general run theaters for a few minutes. You seem to have a background in general run theaters, and you are now operating two in the City Limits of the City of Renton. I understand from your deposition that you made a statement that the general run theater can be as profitable as an adult theater, is that right?

A It could be.

Q Can you tell me what factors play in that profitability vis-a-vis the difference between general run and adult motion pictures? What are the different things that would [38] allow you to take a location that is not profitable as a general run and make it profitable as an adult theater?

A Well, seeing that I'm not competing with anyone else for product, it certainly makes the product that I show more reasonable to me, the costs of the film itself, the amount that I have to pay for the picture versus if I had a general release theater and there are a number of general release theaters in the Renton marketing area, they all go out there and compete for the same picture. So they could theoretically put out more money to play a picture than they are going to take in at the box office. That isn't true with me.

Q Is not your marketing area affected by the other adult motion picture theaters in the King County area if you were to put Deep Throat in that theater tomorrow?

A No.

Q You think that the drawing area is limited to Renton and its environs primarily?

A The concept that I function under is that the theater in Renton is going to draw people from the Renton area. It is not going to draw people from Downtown Seattle or from Marysville or any other place.

Q You have indicated that there are a number of competing general run theaters. I am aware of the Renton theaters, I don't recall their names, but there are three of them [39] I believe that are located over next to the Sheraton?

A It is forbidding in that area for general release pictures. Here's the way they bid the situation out there. A theater will ask for a clearance over Kent, will ask for clearance over the Sea-Tac Six, the six auditoriums there. There are four at the Lewis & Clark. There is a Southcenter Theater and there are the three down there in Renton Village. There are probably 20 places out there. You got the Valley Drive-Ins. All those theaters bid against one another.

Q Is not the bidding system countywide?

A No, it is bid in a zone.

Q I'm asking you to educate me a little bit because I'm not real knowledgeable. How does somebody get On Golden Pond and make you stand in the rain for two hours to get a ticket? Is it more than zonal? Do they take the entire county?

A It varies with the film company and what their policy is going to be, and the way they want their film distributed, but theoretically, you could go in and put up so much money and you could get it for the Greater Seattle area.

Q You are telling me that the same system does not apply for adult motion pictures?

A Well, it would if there were as many adult motion picture theaters in the area as there are general release theaters.

[40] Q Is there a situation such as On Golden Pond where somebody in the locale takes the entire King County area with an adult motion picture? Does that exist?

A No currently today.

Q Has it previously?

A Not yet.

Q I'm just thinking of an instance like Deep Throat. At that time were there a number of theaters or was it just pretty much limited to the Embassy?

A It was played at the Garden. There were other theaters. In fact, before it played at the Garden, it had two runs previously in Seattle and didn't gross a dime.

Q When you went into the Renton and Roxy Theaters, you anticipated, if I understand correctly, that you were going to operate the Roxy Theater as a general run theater?

A Right.

Q Can you tell me how the films were selected for that theater? Did you go into the bidding process that you previously discussed?

A No. I have a verbal agreement with Sterling Theaters for them to book films for me for that theater or both of the theaters at the moment.

Q Can you tell me what type of guidelines you gave them? Is there a dollar maximum per film or a percentage of gross?

[41] A No.

Q Can you tell me why, for example, Raiders of the Lost Ark is not showing?

A It played there at the Roxy.

Q And something such as On Golden Pond?

A Well, I'm not going to put up the kind of guarantees because I don't have the financial resources to do it

the way some of these people do. I would like to be in business for another year or two also.

Q I presume from your statement you have given these people some sort of guidelines of what they are not supposed to do?

A Yes. I don't want to bid for any film in that area.

Q Is it a correct statement that you are then showing second-run films?

A True.

Q Can you explain to me the market for second-run films versus first-run? Is there a percentage you draw, one-third the audience for a second run?

A Not necessarily. That's not true at all.

Q There's no such measure on the market?

A Not to my knowledge.

Q Did you anticipate doing strictly second-run films in the Roxy when you purchased the theater?

A Yes, I did.

[42] Q Did you expect the Roxy to be profitable?

A I expected it to at least break even.

Q Can you tell me what you anticipated that you were going to do that would be different from what Mr. McCray had done previously, to make it at least a break-even proposition?

A Well, I had anticipated having the lowest admission price in the area and trying to put together programs that had the widest appeal, and looking at the current economic situation in this area, I figured that a budget theater would be very good. They have been in other areas. That was something that he wasn't doing.

Q His fares then were higher than yours?

A Yes.

Q I understand yours are ninety-nine cents and a dollar ninety-nine cents, children versus adults?

A Yes.

Q Can you tell me how much higher his was.

A He was charging \$4.00 for adults, and I don't know what he charged for children.

Q Are most of your fares for children?

A Now?

Q Yes. Are most of the fares being paid at the window for children?

A No.

[43] Q If I understand from a very, very brief review of the material that you have submitted to us, both theaters are presently losing money?

A Yes.

Q There was no profit and loss statement for the month of January but I saw one for the month of February.

A We didn't take over the theaters until January 29th.

Q In February it showed—these are rough—A \$7700 loss for the Renton and a \$6500 loss for the Roxy. Have those figures improved?

A I doubt it. Are you asking if they are getting larger? I think they probably are.

Q The losses are getting larger?

A Yes.

Q Has the number of people paying admissions, fallen?

A Well, it varies from picture to picture. I hope that we have a very good weekend coming up this weekend because they have Robin Hood in one theater and Victor Victoria in the other.

Q Do you know the approximate figures for the months of March and April?

A I don't.

MR. SMITH: We have those here.

Q I notice these are done in handwritten form. Are these done by someone in your office for your benefit or was [44] this done by your accountant?

A I haven't seen them to tell you the truth. What are the numbers you had?

Q For February?

A Yes.

Q I'm subtracting the revenue from your costs and expenses to come up with a net loss.

A I see that, but how big was yours for February?

Q Well, there is \$7700 approximately on one and \$6500 on the other, so I come up with 14,2.

A I see there are some figures missing off of here.

Q Mr. Forbes, so that you understand, you have made a statement in your prior deposition that you felt the loss amounted to \$5,000 a week, and the figures that I have been shown for February would indicate that that figure is closer to \$3,000 to \$3,500.

A I think that I said it was three to five thousand a week.

Q I can read your deposition and answer back, but I want to know your present recollection or what your present feeling is. Is your present feeling that it is somewhere between three and five thousand dollars?

A I would guess that, yes.

Q You were discussing the February figures with me, and you said there were some figures missing off of that. In your prior deposition, you indicated you would take costs and [45] revenue and you would subtract the figures to come out with a loss or profit. Are there some figures that are not included in this?

A I see that there are two columns that are blank. I know that we have to have insurance, but the figures aren't there.

Q Can you tell me if you have any figures for March?

A I see there are some here, yes.

Q Can you show me what you are looking at?

A (Witness complies.)

Q There is apparently a recap sheet for March of 1982 and the bottom line of this thing shows profit and loss and it would appear that the loss for the Renton was \$3,306, and the Roxy was \$5,542 for a total of just about \$8,850, which is substantially less than what was shown in February. Can you explain the difference to me?

A Can I explain the difference to you?

Q Yes.

A Let me take a look at it and see what it says.

Q I think it's obvious that you did better on your revenue.

A Yes. That's what it is.

Q Do you have any idea what the figures are going to be for April?

A April, I think, will look like February.

Q Have you had any preliminary figures to tell you how May [46] is doing with hopefully this good weekend you may have?

A I would guess that May is going to look like March, so there is two like February and two like March.

Q Have you seen preliminary statements for April or May at this point?

A No. I haven't even seen these before.

Q I'll ask you the question again, because I'm not sure that I got the answer or I don't remember it, are these done by Benson & McLaughlin or somebody in your organization?

A Those are done in-house.

Q Who would be the person in-house that would do these?

A Patti Jones.

(Short recess.)

Q Mr. Forbes, you just handed me a document that is your internal recap sheet for April, 1982, that your counsel has handed you and it is in the material that's to be given to us today to review. It indicates that the Renton Theater lost \$5,288 and the Roxy \$1,688 for the month of April. Those are the figures you see at the bottom?

A Is there a one in there? I think that's only \$688. I don't think there's a one in there.

Q So the total is less than \$6,000?

A It looks to me like about six.

[47] Q You believe that the month of May will be what?

A Not as good.

Q Except maybe for this dynamite weekend?

A That would be nice.

Q Let me inquire just a little bit into what was gone into during your prior deposition. In your prior deposition, you seemed to indicate—this is my reading of your deposition, so correct me if I'm wrong, but how you were arriving at the damages that you are going to claim on the Renton Theater was by comparing it to the theater in Dishman. Is that an incorrect assumption on my part or has your position changed since then?

A Well, I think the more fair thing for you is to compare its prior performance with its performance afterwards.

Q Let's go into what you believe the performance is going to be like afterwards. You have used the Dishman Theater as an example that you think is the closest in comparability with the Renton Theater. Can you tell me what type of net profit is made by the Dishman Theater?

A I can't tell you right off the top of my head. I could probably make a guess.

Q Is that an educated guess or just a wild guess?

A It's just a wild guess. I was surprised looking at these numbers. I thought I was doing worse than what they showed me.

[48] Q Do you know the net profit for any of your theaters individually?

A No.

Q Is there some sort of a corporate calculation of those theaters on a month-by-month basis?

A There probably might be someplace. I don't know.

Q Is the same lady, Patti Jones, the one that would have them?

A Yes.

Q I was left with the feeling that the Spokane Theater grossed five or six thousand dollars a month?

A A month?

Q Excuse me, a week.

A That would be closer to it.

Q Can you tell me what the expenses are? Is it half of that?

A The rent is \$4500 a month.

Q Are the rest of the operating expenses equal to that, for example?

A Well, I can't tell you. I don't have the figures here with me. Whatever I told you would be just a wild guess.

Q Mr. Forbes, in reviewing the information that was provided to us, I came across a title report on the subject property in Renton. Did you review that title report?

A I probably looked at it.

Q There was a statement in the title report that there was a [49] restrictive covenant with respect to the showing of obscene materials. Did you know that covenant existed when you bought the theater?

A I don't show obscene motion pictures.

Q I'm not asking you that. I'm asking you if you knew that it existed?

A I knew that it existed.

Q Was that discussed?

A I didn't think that was necessary to discuss it. It doesn't apply to me.

Q Let's talk just for a very brief moment on the market analysis. As I understand it, you did an informational market analysis for the Renton area, is that right?

A I made some observations through the years that I have been in the exhibition of motion pictures in the Greater Seattle area, about the Renton area, yes.

Q Could you tell us what type of observations that you made?

A Well, let me tell you how I arrived at the plan of where I'd put my theaters, where I want them situ-

ated. I spent a number of years working for Sterling Theaters. At the time I was there, they had three major theaters in three geographic areas of Seattle, the John Danz on the East Side, the Northgate in the North End of Seattle, and the Lewis & Clark in the South End. I said, gee, that works [50] real well for them, so if I were to adopt the same plan, it should work well for me because I have a particular audience that I appeal to, these areas are large enough to support one of these theaters and that's how we approached it.

Q You felt there was not adequate showing of adult motion pictures in the South End?

A I thought there was a vast untapped market there.

Q Does Des Moines play in your theory at all?

A No.

Q Why is that?

A Because I think that Des Moines is too hard for people to get to. My primary focus has always been Renton itself as being the area that you can draw everything into.

Q So if I understand, you believe that the ease of access to the theater is an appreciable item that you would consider in locating a theater?

A Yes.

Q Having a lot of experience with driving in Renton, do you believe that the Renton and Roxy Theaters are easily accessible?

A They have been for 40 years.

Q Do you believe that the access to those theaters in Renton are better than the one in Des Moines?

A Yes.

[51] Q Using your analysis, is there not also a vast untapped market in the North End of Seattle?

A Sure.

Q If I understand it, for a short period of time you operated the North End Theater now known as the Greenwood?

A It's not far enough north. The proper area to be in the North End would be someplace around Lynnwood.

Q Was your market analysis done with the assistance of any other person outside of yourself and done outside of your own personal knowledge?

A No.

Q Just strictly your experience in the adult motion picture and general theater business that led to that analysis?

A Yes.

CROSS EXAMINATION

BY MR. BURNS:

Q Mr. Forbes, in identifying a number of motion pictures, Behind the Green Door, The Evil Ways of Love, Count the Ways, Danish Pastry, Deep Throat and the Private Life of Pamela Mann, were you referring to a packet of documents that had been handed to you?

A Yes.

Q Would you like those included as an exhibit to your deposition?

A Certainly.

[52] (Documents marked as Plaintiff's Exhibit 1.)

MR. BURNS: That's all I have.

MR. WARREN: For the record then, I would also like to have marked as exhibits the recap sheets for March and April.

(Documents marked as Defendant's Exhibits 1 and 2.)

(Noon Recess.)

MR. WARREN: For the record, I would like to continue this deposition to another time upon notice for the following reasons:

First is we had discussed today the scope of our Subpoena Duces Tecum and we seemed to disagree as to the scope of it. That questions need to be resolved. We believe that the second part of our Subpoena that references all books, documents or things which might be introduced or used by plaintiff to establish facts to sup-

port damages, has not been met and we disagree on that point. That will have to be resolved, I presume, by a judge.

Secondly, if there is a doubt, we would like to couch a new Subpoena and submit it.

Thirdly, we have a number of documents that have been produced this morning, and I have gone through them [53] briefly and simply don't have the time to digest all the information so as to utilize those documents in an effective manner. Finally, Mr. Forbes has indicated some problem with the shortness of time today. If we got into this, it would probably carry over into tomorrow. I wish to avoid that. I think the main reason is the documents we don't have and the lack of time to review them.

MR. SMITH: Mr. Forbes has all the time you need him for and although he went to lunch, he has indicated he is available to come back to us by 1:15 and could continue for the rest of the day, through tomorrow morning. I don't think that should be one of the grounds upon which you seek to continue this. I have no objection to continuing, but I don't think that's a valid objection.

MR. WARREN: Perhaps I misunderstood what Mr. Forbes was saying or what you were saying, Counsel. If that's not a problem, it's not a problem. I would still like to continue the deposition. We have talked off the record about the measure of damages. I was concerned about the various theaters and the various films and felt that we needed profit and loss statements and the analysis of the individual films to prepare an adequate defense. You have indicated on the record a different measure of damages that I have not had a chance to analyze. So that is also a basis for why we wish to continue the [54] deposition. I presume that the explanation you have given us before both on and off the record, that you are going to be trying to measure the loss by the business

done before and after Mr. Forbes is permitted to operate, if any, is your present position.

MR. SMITH: Assuming that one day he can operate, that would be our position presently and future, we are quite sure. As I said before, if that fails, by your objection and the judge rejecting it, then obviously we don't have a theory of damages as to Kukio Bay and Playtime Theaters.

(Plaintiffs' Exhibit 1 attached.)

(Defendant's Exhibits 1 and 2 left with Counsel.)

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-59M

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiff,

vs.

CITY OF RENTON, *et al.*,
Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF LISA M. PUDDY

BE IT REMEMBERED, that the Deposition Upon Oral Examination of LISA M. PUDDY, appearing as a witness at the instance of the defendants, was taken at 100 South Second Street, Renton, Washington, beginning at the hour of 1:30 o'clock p.m., on June 16, 1982, before Robert C. Webber, Notary Public in and for the State of Washington;

APPEARANCES:

JACK R. BURNS, Attorney at Law, appearing for and on behalf of the plaintiffs;

MARK BARBER, Attorney at Law, appearing for and on behalf of the defendants;

WHEREUPON, the following proceedings were had and testimony taken, to-wit:

EXAMINATION INDEX

Counsel	Page
Mr. Barber	2-20
Exhibit No. 1	EXHIBIT INDEX Chart of Theatres Owned by Playtime Theaters, Inc. 14

* * * * *

[2] LISA M. PUDDY,

being first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BARBER:

Q Would you state your full name for the record, please?

A Lisa Michelle Puddy.

Q Lisa, have you ever had your deposition taken before?

A No, I have not.

* * * * *

[4] MR. BARBER: * * * [5] With respect to the Subpoena Duces Tecum and Notice of Deposition that was directed to Playtime Theaters requesting that you designate a party to testify to certain matters, under Federal Rules of Civil Procedure which I believe is 30(b)(6), are you designating Lisa Puddy to testify with regard to those matters?

MR. BURNS: Yes. Ms. Puddy was subpoenaed and the corporation was directed to designate somebody to testify regarding the placement of advertising in newspapers and other communications media regarding films, and the corporation has designated Ms. Puddy as that person. So we are only producing one person at this time, but it is in conformity with all requests that we are aware of.

Q Would you state your present residence address?

A 3600, 14th Avenue West.

Q That's in Seattle?

A Yes, it is.

Q My understanding is you are employed by Playtime Theaters, Inc.?

A I am.

Q How long have you been employed by Playtime Theaters, Inc.?

[6] A It's been six months.

Q When would you have started your employment with Playtime Theaters, do you recall?

A Actually I qualified for insurance in May and it's six months, so count backwards.

Q November of 1981?

A Yes.

MR. BURNS: If you are not certain about an answer, can you give your best approximation.

THE WITNESS: Patti would know for sure, but it was November, '81.

Q Lisa, by whom were you hired to work for Playtime Theaters?

A Roger Forbes.

Q What was your position in November of 1981 when you were first hired by Mr. Forbes for Playtime Theaters?

A What position was I hired as?

Q Yes.

A Advertising Manager.

Q Have you continuously held that position until today?

A Yes.

Q Could you tell me what it is that you do as Advertising Manager for Playtime Theaters?

A My primary job is to place the ads in the newspapers. I handle the bookings and make sure that everybody in the [7] office knows what they are, for shipping and receiving of posters, accessories, one sheet, trailers, and making sure that the theaters get those.

Q Anything else?

A A lot of little other things, the layout and the design of the ads, handling the budget.

Q As Advertising Manager, do you have any persons working beneath you that assist you in performing these duties?

A As of three months ago, another person was hired who is actually laying out the ads.

Q Who is that?

A John Flodin.

Q John has been there since about March of this year?

A Yes.

Q His work is in doing the layouts for the ads?

A Yes.

Q Let me see if you can define some terms for me. You talked about layouts and designs of the ads. Specifically what would that include?

A I take the budget that is given to me by Roger and look at the column sizes of the newspaper and the rates of the newspaper which vary from paper to paper and determine what the best way is to take the elements of the ads, the title and the copy, and put it into mechanical production for the newspapers to reproduce it.

[8] Q Would it be correct to say that you as Advertising Manager then are responsible for how the ad is designed and what its contents are?

A I try to be.

Q Who would be your immediate superior?

A Roger.

Q Mr. Forbes?

A Yes, Mr. Forbes.

Q Do you have to refer any decisions regarding the layout or design of ads to Mr. Forbes before you have them published in the newspaper?

A Sometimes, yes.

Q Could you give me an example when that might occur?

A We will get press material from the distributor which I will show to him and he will use that to determine the budget. So he will often look at the layout after it's done and decide if he wants a larger ad for Friday. He previews the ads before they go to the paper, the layout.

Q Do you know if he previews all of the ads before they go to the newspapers?

A Not always. If he's out of town or not in the office, but he does see them, the layouts, before they go.

Q Would anyone else employed by Playtime Theaters review the ads beyond you before they went to the papers?

A No.

[9] Q With respect to Playtime Theaters, I am aware that they have several theaters throughout the State as well as one in Portland, Oregon, but keeping in mind the theaters in Washington State that they operate and/or own, are there any which do not have ads run for the films that are shown at any specific theater?

A Daily advertising in newspapers, you mean?

Q Yes.

A Walnut Park.

MR. BURNS: That's not in the State of Washington.

THE WITNESS: I'm sorry. The Liberty Theater in Pasco we do not advertise for.

Q Is there any particular reason why Playtime Theaters has chosen not to advertise for the Liberty Theater in Pasco?

A I'm not aware of any reason.

Q With respect to the ads for the other theaters, other than say Pasco and excluding Walnut Park in Oregon, are those ads run on a daily basis in the other newspapers in which you advertise?

A That's more than a yes-or-no answer. Yes, we do place daily advertising, but some papers do not publish on Saturday or we cannot run ads on Sunday because the rates are double, but for the most part we do place daily advertising.

[10] Q Could you tell me what newspapers you do place ads in on behalf of Playtime Theaters?

A Certainly. In Seattle, it's the Seattle Post-Intelligencer and the Seattle Times; the Vancouver Sun in Canada for the Point Roberts Theater; the Spokesman Review and Chronicle in Spokane; and the Bremerton Sun and the Tacoma News Tribune. Now we also for

our Renton and Roxy Theaters, have show times published that is not daily advertising.

Q With respect to the Bremerton Sun, that would be for the Grand Theater?

A Yes, it would.

Q And the Tacoma News Tribune would be for the Rex?

A And the Community.

Q Spokane would be for the Dishman?

A Yes.

Q For Seattle it would be the Embassy?

A Yes.

Q And the Palace?

A Yes, and the Cinemond, and the Renton and the Roxy.

Q At various times do you use the same ads for the same film when it is shown in different cities where Playtime Theaters has a theater located?

A Impossible. The column sizes are all different. We have to do a different ad for each one.

[11] Q So if you were showing a certain film at the Dishman in Spokane, a different ad may appear when the film showed in Bremerton at the Grand Theater just because of the requirements of the newspapers between the Spokesman Review and the Bremerton Sun?

A Yes. The budget and the column size have a lot to do with the finished product.

Q With respect to the films that play, do they change at certain times of the week at various theaters?

A They run from Friday to Thursday so the film starts on Friday and they end on Thursday.

Q Did you cease doing all layouts and designs for the ads when John Flodin became employed by Playtime?

A No. I supervise him but I also take part in creating the ads. I provide the input as regards to the copy, the use of the artwork, and the placement of the ads with the newspapers.

Q Would Mr. Flodin have to come to you with the layout and designs that he has done?

A Yes.

Q A couple of other terms I want to get some definitions from you on, but I'm familiar with; you used the term trailers. I'm not sure how you meant that.

A Trailers are usually three to four minutes of film that are used during intermissions, of coming attractions.

[12] Q When you referred to the term bookings, how did you mean that?

A Bookings are the titles of the films that are coming which are provided through a California agent, and I get all that information and then have to assemble the accessory information and where it is being recircuited to. So the booking information is very important, but that's what it is, what is being booked into the theaters.

Q In your position in handling the advertising for Playtime Theaters, have you noticed that films that show in one city at one theater operated or owned by Playtime Theaters may subsequently be shown in another theater owner or operated by Playtime?

A Have I noticed that they go from one theater to another?

Q Yes.

A Yes. There is definitely a pattern that we recircuit the films.

Q Could you explain what that pattern is which leads to the films being recircuited as you say, where it goes from one theater that Playtime owns, to another?

A The pattern does change and it includes a lot of variables that I don't know you need all the details for. The basic pattern is that we usually premier in our Seattle theaters, the Palace and the Cinemond and the Rex Theater in Tacoma, and several weeks later, the films will then be [13] recircuited to our outlying areas, Bremerton and Spokane and Point Roberts. Then at the Embassy and Community, sometimes we get old film that's moved over or comes back, but there is no real

pattern there as far as the recircuiting the film goes.

Q So I understand with respect to the Embassy and the Community Theaters, when you say there is no pattern, with films that turns up in the Embassy and the Community, would they have already played in other Playtime Theaters?

A Yes. They are usually second run.

Q I believe you indicated earlier that the pattern in which films shown by Playtime Theaters, Inc., are changed, does have some variables that you are not acquainted with?

A I'm aware of some of those variables. The availability of the print from the distributor can affect whether a film is recircuited or not, for instance, or it gets lost.

Q Or destroyed or something like that?

A Yes.

Q Are there other variables that may affect the circuiting of a film throughout the Playtime Theaters' chain other than what you have already disclosed?

A Yes. There are other variables, I'm sure, that the distributors and Roger would know more about than I do. The shipping and receiving of the film and the availability of the print are the two main variables that [14] I know the details of.

Q Then if there were other variables that affected how films were circuited through theaters owned or operated by Playtime Theaters, we would either have to ask the distributor or Mr. Forbes?

A Yes.

(Discussion off the record.)

MR. BARBER: Let the record reflect that while we were off the record, I asked Ms. Puddy if she had brought any documents with her pursuant to the Subpoena Duces Tecum, and she has none with her other than, of course, the notice of this deposition and the Subpoena.

MR. BURNS: Counsel, the plaintiff has already indicated the reasons why. Let the record also reflect that.

(Document marked as Defendant's Exhibit 1.)

Q Lisa, I have handed you what has been marked for identification as Defendant's Exhibit No. 1. This exhibit indicates basically several theaters which are owned or operated by Playtime Theaters, the Bremerton Grand, the Tacoma Rex, Tacoma Community, Spokane Dishman, the Palace which is misspelled by the way on this chart, the Seattle Embassy and the Redmond Cinemond Theaters. It runs for a period of time between March 2nd of this [15] year to June 8th of this year. My understanding is that Mr. Flodin, at least for the past three months, has had the responsibility for preparing some of the layouts for the advertisements that have been placed in newspapers that have affected the theaters in these communities. With respect to your memory and what it is that you recall that may have played at these various theaters during the period of time indicated on this chart, could you review this and give me an idea as to what it is that you recollect and do not recall played at the Bremerton Grand, say, between March 2nd of this year and June 8th of this year?

MR. BURNS: I'm going to object. First of all, this is an exhibit which is not a business record of Playtime Theaters, Inc. It was not prepared by Playtime Theaters, Inc. It was not prepared by the witness. It purports to list, I would guess, approximately 200 film titles which purportedly played at certain theaters on certain dates of which this witness may or may not have any present recollection as to whether they did or not. Secondly, all of the theaters involved are theaters not associated with this lawsuit. It involves advertising relating to theaters which we have objected to the Request for Production of Documents with respect to them. Accordingly, it is our judgment that any discovery with [16] respect to these thea-

ters is irrelevant to any issue in this lawsuit. It is not designed to lead to discovery of relevant evidence. I direct the witness not to answer any questions about advertising at any of these theaters.

Q Lisa, you testified that these films are recirculated throughout theaters owned and operated by Playtime Theaters?

A Yes. Currently that's our booking pattern.

Q So if Playtime Theaters has decided to show adult film fare at a theater that it owns or operates in the City of Renton, would film eventually be recirculated into that theater in Renton?

MR. BURNS: Objection. You are asking the witness to speculate. It is outside the expertise of this witness. She is not involved in the buying and booking of films and she has no knowledge from which to answer that question.

Q You may answer.

MR. BURNS: You can go ahead and answer if you know.

A If I know? I actually really don't know how Renton would be booked.

Q Mr. Forbes has never indicated to you how he would intend to book films into the theaters located in Renton, is that correct?

[17] A Oh, there are several different ways they could be booked. I would guess it would be a first-run house, but that's speculation, isn't it?

Q Could you explain to me some of the other ways that films might be booked into theaters in Renton?

MR. BURNS: Objection. Again, this is not this witness's area of expertise. She was not designated to testify with respect to buying and booking. There is no indication that she has any knowledge or information about buying or booking. I object to the form, nature and substance of the question, and its relevance. If you have any information, you can give it to him.

A The other way we book it is as a second-run house.

Q Then it would be treated like the Embassy or the Community Theaters?

A Perhaps.

Q With respect to your present recollection, Lisa, I want you to bear this in mind, that I'm looking at what you recall at this point in time, in looking at the chart and in regard to the Bremerton Grand, based upon your present recollection, what do you recall having placed ads or prepared layouts for the Bremerton Sun films that would be showing at the Bremerton Grand Theater?

MR. BURNS: Object to that question for the reasons already stated and direct the witness not to answer.

[18] Q Lisa, I hand you an ad that appeared in the Bremerton Sun Wednesday, March 3, 1982, and ask with respect to that ad for the Bremerton Grand if you are familiar with that ad and your participating in this layout or approving it?

MR. BURNS: I object to the question for the reasons previously stated and direct the witness not to answer. We objected to production of any records for advertising relating to any theater other than the Renton Theaters and that objection has been filed with the court and until the court directs us that these areas outside the City of Renton have any relevance to this litigation, I direct the witness not to answer.

MR. BARBER: Mr. Burns, are you going to direct the witness not to answer as to films that played at all of the theaters owned or operated by Playtime Theaters in the State of Washington?

MR. BURNS: Except for those theaters within the City of Renton, yes.

MR. BARBER: So any questions that I ask the witness with respect to theaters owned or operated by Playtime Theaters outside the City of Renton which show adult film fare, you will direct her not to answer, is that correct?

MR. BURNS: That's correct.

(Short recess.)

[19] MR. BARBER: Mr. Burns, in view of the position of your client Playtime Theaters, Inc., that you will object and instruct the witness not to answer questions as to those films which play in theaters owned or operated by Playtime Theaters, Inc., other than those two theaters which are located in the City of Renton, I see little use in continuing the deposition at this time. It should be noted for the record that the City of Renton disagrees with the position which you have put forth on behalf of your client. We believe the material is relevant material to this litigation and is subject to discovery.

MR. BURNS: In what way do you think it is relevant?

MR. BARBER: We feel it is relevant in view of the fact that you have indicated that you would be showing adult film fare in your complaint at the two theaters located in the City of Renton and we are attempting to establish what that fare would be.

MR. BURNS: The fare is defined by your ordinance.

MR. BARBER: I'm talking about the film fare that Playtime Theaters, Inc., would intend to show in the City of Renton if it wished to operate an adult film theater in this city. With that in mind, I would rather [20] not adjourn the deposition of this witness at this time because it will depend upon whether or not the City of Renton should decide to bring a Motion to Compel this information at a later time.

MR. BURNS: Why don't we just continue it to a date to be set or to be adjourned upon agreement of the parties?

MR. BARBER: I believe that would be a proper thing to do. With that in mind, we will conclude the matter for today.

(Exhibit 1 attached.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3805

DC# C-82-59-M
Western Washington
(Seattle)

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Plaintiffs-Appellants,

vs.

CITY OF RENTON, *et al.*,
Defendants-Appellees.

No. 83-3980

DC# C-83-744-C
Western Washington
(Seattle)

THE CITY OF RENTON, *et al.*,
Plaintiffs-Appellants,

vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants-Appellees.

[Filed Apr. 30, 1985]

Before: FLETCHER and FARRIS, Circuit Judges, and
JAMESON,* District Judge

ORDER

Playtime's motion for attorneys' fees and disbursements is denied without prejudice as premature. In light of our remand to the district court for further proceeding, Playtime cannot yet be deemed a prevailing party for purposes of 42 U.S.C. § 1988. Should Playtime ultimately prevail, an award of reasonable attorneys' fees for the entire litigation may then be sought.

The City's motion to recall and stay the mandate is denied. Our disposition of Playtime's application for fees and disbursements renders moot the City's alternative request that we remand that question to the district court.

* Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[EXHIBIT 6]

THE CITY OF RENTON
Municipal Building 700 Mill Ave. So.
Renton, Wash. 98055
Barbara Y. Shinpoch, Mayor

MEMORANDUM

TO: Council President Tom Trimm
FROM: Mayor Shinpoch

DATE: May 22, 1980

Our Hearing Examiner has made a suggestion I believe has merit which Council may wish to pursue.

In view of the difficulties some cities have had re-doing their zoning or other ordinances (AFTER an adult theater, bookstore, film and/or novelty shop, etc., has obtained a business license) to respond to the public outcry, it might be to our community's benefit to anticipate this type of business and pass legislation, or state a Council policy, which would designate non-acceptable enterprises/localities.

This way Council would not be in a position of reacting but, rather, of careful preparedness. You would, of course, need advice from our attorneys, but I thought it might be worth your consideration.

Barbara

BARBARA Y. SHINPOCH, Mayor

BYS:hh

cc: All Council Members

[This exhibit to the June 23, 1982 hearing before the Honorable Philip K. Sweigert, United States Magistrate, was inadvertently omitted from the initial printing of the Joint Appendix. If properly inserted, this exhibit would have appeared after JA 291.]